

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940 *1941*

No. 908

42

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE,
OF THE STATE OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF NEW YORK

PETITION FOR CERTIORARI FILED MARCH 29, 1941
CERTIORARI GRANTED MAY 5, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 903

THE UNITED STATES OF AMERICA, PETITIONER

VS.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE
OF THE STATE OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF NEW YORK

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New York Supreme Court
APPELLATE DIVISION—FIRST DEPARTMENT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—against—

LOUIS H. PINK, Superintendent of Insurance of the
State of New York, and as Liquidator of the
Domesticated United States Branch of the
FIRST RUSSIAN INSURANCE COMPANY, ESTAB-
LISHED IN 1827,

Defendant-Respondent,

VICTOR YERMALOFF, and others,

Defendants.

Statement Under Rule 234.

This action was commenced by personal service of the summons and complaint upon the Superintendent of Insurance on November 16, 1937. The defendant Louis H. Pink, Superintendent of Insurance, served his answer to the complaint on the 25th day of March, 1938. On or about the 17th day of May, 1939, the defendant Pink served upon the plaintiff a notice of motion to dismiss the complaint and for summary judgment as to said defendant, and this motion was argued at a Special Term, Part III, of the Supreme Court, New York County, on 13th day of June, 1939, before Mr. Justice Aaron J. Levy

Statement Under Rule 234.

The names of the original parties involved on this appeal are as above stated and there has been no change of such parties since the commencement of this action. There are numerous other parties defendant in the action, all of whom are referred to in the complaint printed herein. None of such other parties has moved to dismiss the complaint nor are any of such other parties parties to this appeal.

**Notice of Appeal by United States of
America.**

**SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

7

UNITED STATES OF AMERICA,

Plaintiff,

—against—

**LOUIS H. PINK, Superintendent of Insurance of the
State of New York, and as Liquidator of the
Domesticated United States Branch of the
FIRST RUSSIAN INSURANCE COMPANY, ESTAB-
LISHED IN 1827, and others,**

8

Defendants.

Sir:

Please take notice that the United States of America, the plaintiff above named, appeals to the Appellate Division of the Supreme Court, First Department, from the order of this Court dated and entered in the office of the Clerk of the County of New York in the above entitled action on the 29th day of June, 1939, and from the judgment in the above entitled action entered in the office of the Clerk of the County of New York on the 30th day of June, 1939, wherein it is ordered and adjudged that the complaint in the above entitled action be

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Notice of Appeal by United States of America.

10 dismissed upon the merits in favor of the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company Established in 1827, and from each and every part of said order and/or judgment.

Dated: New York, N. Y., July 11, 1939.

JOHN T. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
United States of America,
Office & P. O. Address,
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

To:

JOHN M. DOWNES, Esq.,
Attorney for the Superintendent of
Insurance of the State of New York,
Office & P. O. Address,
State Office Building,
Albany, N. Y.

12

New York Office,
160 Broadway,
New York, N. Y.

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Order Appealed From.

At a Special Term, Part III, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, Borough of Manhattan, City, County and State of New York, on the 29 day of June, 1939. 13

P r e s e n t :

HON. AARON J. LEVY,

Justice.

[SAME TITLE]

14

A motion having been made by the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827, by a notice of motion dated May 17, 1939 for an order dismissing the complaint herein and awarding summary judgment in favor of the defendant, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company Established in 1827, on the ground that there is no merit to the action and that it is insufficient in law; and said motion having regularly come on to be heard before this Court on the 6th day of June, 1939 and thereafter adjourned to the 13th day of June, 1939;

Order Appealed From.

Now, on reading and filing the complaint herein, verified the 16th day of November, 1937, the answer herein duly verified the 24th day of March, 1938, and upon reading and filing the notice of motion herein dated May 17, 1939, with due proof of service thereof, together with the affidavit of John M. Downes, sworn to May 17, 1939, in support of said motion, the affidavit of Leon E. Spencer, sworn to June 6, 1939, in opposition thereto, and after hearing John M. Downes, Attorney for the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827, in support of said motion, and John T. Cahill, United States Attorney, by Leon E. Spencer, of counsel, in opposition thereto, and due deliberation having been had thereon, and upon filing the decision of the Court,

Now, on motion of John M. Downes, Attorney for the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company Established in 1827, it is

Ordered, that the motion herein for an order dismissing the complaint and awarding summary judgment in favor of the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company Established in 1827, pursuant to Rule 113 of the Rules of Civil Practice, be and the same hereby is in all

Order Appealed From.

respects granted, and the said complaint be and the same hereby is dismissed on the merits; and it is hereby further

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Ordered, that judgment herein be entered, in favor of the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company Established in 1827, against the plaintiff, United States of America, dismissing the complaint herein on the merits, together with the costs of this action to be taxed by the Clerk, and that said judgment be entered by the Clerk of the Court without further order.

20

Enter,

A. J. L.,
J. S. C.

21

Judgment Appealed From.

22

**SUPREME COURT
OF THE STATE OF NEW YORK****NEW YORK COUNTY****County Clerk's Number 32347—1937**

[SAME TITLE]

23

A motion having been made herein by the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827, to dismiss the complaint and for summary judgment in favor of said defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827, and against the plaintiff, United States of America, and said motion having been duly argued at Special Term, Part III, of the Supreme Court of the State of New York, held in and for the County of New York on the 6th and 13th days of June, 1939, and the Court after due deliberation having granted said motion, and an order having been duly granted, by the said Special Term of this Court dated and entered in the office of the Clerk of New York County on the 29 day of June, 1939 granting said motion and dismissing the complaint and directing judgment as hereinafter provided, and the defendant's costs having been duly taxed at the sum of \$25.00,

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Judgment Appealed From.

Now, on motion of John M. Downes, Attorney for the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827, it is 25

Adjudged, that the plaintiff's complaint be, and the same hereby is dismissed upon the merits, and that the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827, of 160 Broadway, New York City, have judgment in his favor dismissing the complaint herein and that said defendant recover of the said plaintiff of U. S. Court House, New York City, the sum of \$25.00, his costs in this action as taxed. 26

ARCHIBALD R. WATSON.

**Notice of Motion to Dismiss Complaint
and for Summary Judgment.**

SUPREME COURT
OF THE STATE OF NEW YORK

NEW YORK COUNTY

[SAME TITLE]

Sirs:

Please take notice that on the complaint herein, verified the 16th day of November, 1937, and
 29 the answer herein, verified the 24th day of March, 1938, and on the affidavit of John M. Downes, sworn to the 17th day of May, 1939, a motion will be made at a Special Term, Part III, of the Supreme Court of the State of New York, to be held in and for the County of New York, at the Court House therein, on the 6th day of June, 1939, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein and awarding summary judgment in favor of the defendant, Superintendent of Insurance of the State of New York, as Liquidator of the United States Branch of
 30 First Russian Insurance Company Established in 1827, pursuant to Rule 113 of the Rules of Civil Practice and Section 476 of the Civil Practice Act, on the ground that there is no merit to the action and that it is insufficient in law, and for such other and different relief as may be proper, with the costs of this motion.

*Notice of Motion to Dismiss Complaint and for
Summary Judgment.*

Please take further notice that pursuant to Rule 64 of the Rules of Civil Practice you are 31
required to serve answering affidavits at least five
(5) days before the return day of this motion.

Dated, New York, N. Y., May 17, 1939.

Yours, etc.,

JOHN M. DOWNES,

Attorney for Superintendent of In-
surance, as Liquidator of the Uni-
ted States Branch of First Russian
Insurance Company Established in 32
1827,

Office & P. O. Address,
160 Broadway,
Borough of Manhattan,
New York City, N. Y.

To:

JOHN T. CAHILL, Esq.,

United States Attorney for the
Southern District of New York,

Attorney for United States of America,

U. S. Court House,

Foley Square, New York City, N. Y. 33

**Affidavit of John M. Downes, Read in
Support of Motion.**

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**SUPREME COURT
OF THE STATE OF NEW YORK
NEW YORK COUNTY**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

35

**LOUIS H. PINK, Superintendent of Insurance of
the State of New York, and as Liquidator of
the Domesticated United States Branch of the
FIRST RUSSIAN INSURANCE COMPANY ESTAB-
LISHED IN 1827, and others,**

Defendants.

**STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:**

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**John M. Downes, being duly sworn, deposes
and says that he is an attorney at law and the at-
torney for the Superintendent of Insurance of the
State of New York as liquidator of the United
States Branch of the First Russian Insurance Com-
pany Established in 1827, one of the defendants
herein, and is familiar with and has knowledge
of the facts concerning this litigation and the
proceedings involving the liquidation of the United
States Branch of the company in New York.**

*Affidavit of John M. Downes, Read in Support
of Motion.*

This affidavit is made in support of the motion to dismiss the complaint herein and for a summary judgment in favor of defendant, the Superintendent of Insurance. . .

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There is no dispute as to the facts. The complaint alleges and the verified answer admits the facts concerning the history of the organization of the United States Branch of the First Russian Insurance Company Established in 1827 and the facts concerning the proceedings and litigations involving the said company since its admission to do business in the State of New York in 1907. The verified answer merely denies certain conclusions of law in the complaint and sets forth six separate defenses to the plaintiff's cause of action. These defenses need not now be considered for the complaint standing alone is insufficient in law and must be dismissed.

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This action was brought by the United States of America as assignee of the Union of Soviet Socialist Republics (Complaint, paragraph 19). The plaintiff seeks judgment declaring it to be the owner of the funds of the United States Branch of the First Russian Insurance Company in possession of the Superintendent of Insurance, as Liquidator, and directing the liquidator to turn said funds over to the plaintiff. The plaintiff claims ownership of the funds by virtue of several decrees of the Russian Government which, it is claimed, dissolved, terminated and nationalized all Russian insurance companies and organizations. It is further alleged that these decrees transferred title to the assets of the United States Branch of the First

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*Affidavit of John M. Downes, Read in Support
of Motion.*

10 Russian Insurance Company Established in 1827 to the Russian State which in turn assigned the property to the United States of America on November 16, 1933 (Complaint, paragraphs 8-9).

The bases, therefore, of the claim of the plaintiff are the Soviet decrees which, it is asserted, have extraterritorial effect and had force to transfer title to property always in the State of New York to the Soviet government.

41 Whatever may have been the law when the complaint herein was served and issue joined by the defendant's answer, it is now authoritatively settled by virtue of the decision of the Court of Appeals of the State of New York in *Moscow Fire Insurance Company v. Bank of New York and Trust Company*, 280 N. Y. 286, decided April 11, 1939, that the right to assets belonging to the United States Branch of a Russian insurance company is not dependent upon "the law of Russia as formulated in the Soviet decrees", and that no decree "could possibly have been intended to apply to business conducted here, or if so intended could be binding here".

42 The Court of Appeals in the *Moscow* case was dealing with property belonging to the United States Branch of the *Moscow Fire Insurance Company*, which company was authorized to do business in the State of New York, and which had made statutory deposits pursuant to the Insurance Law in exactly the same manner as did the First Russian Insurance Company involved in the instant case.

*Affidavit of John M. Downes, Read in Support
of Motion.*

The plaintiff alleges (Complaint, Paragraph 6) that there was organized and established in 1907 in the State of New York "a domesticated United States Branch, in compliance with the laws of the State of New York", which branch "was thereupon authorized by the State of New York to transact and thereafter did transact business in this State and elsewhere in the United States under reciprocal laws then in force in other states of the United States". This allegation is admitted by the defendant, the Superintendent of Insurance as Liquidator of the First Russian Insurance Company. The plaintiff further alleges (Complaint, paragraph 7) that as part of its compliance with the laws of the State of New York there was deposited with the Superintendent of Insurance, cash, securities and other assets. This, too, is admitted by the defendant.

So far as it is material here therefore, the facts in the *Moscow* and the instant cases are parallel. The facts could not be different because both companies had to comply with the provisions of Section 27 of the Insurance Law (Cons. Laws, Ch. 78) as a condition precedent to doing business here.

The Soviet decrees involved are also the same. In the *Moscow* case the United States relied on the decree of November 18, 1919 annulling all life insurance contracts, a decree dated March 4, 1919 on the liquidation of obligations of State enterprises and a decree dated June 28, 1918 that certain enterprises located within the Soviet Union are the property of the Republic. In the instant

*Affidavit of John M. Doynes, Read in Support
of Motion.*

case the same decrees are relied upon (Complaint, paragraph 8).

In the *Moscow Fire Insurance Company* case the Court of Appeals has held that the property of the United States Branch claimed by the plaintiff was property which at all times had been within the State of New York, title to which had always been in various trustees and which always had been subject to the control of the Insurance Department. The Court held that such property was immune from Russian governmental control, and that decrees of such a government could not affect the property of the United States Branch of a Russian insurance company. The Court of Appeals therefore held that foreign creditors who, in 1931, had been "invited" by that Court to prove their claims in the liquidation proceeding could not now be dismissed empty handed, and rejected the claim of the United States to the funds.

Your deponent verily believes that there is no merit as a matter of law to the action set forth in the complaint herein. The undisputed facts show that the monies of the First Russian Insurance Company Established in 1827 have always been within the State of New York and in the custody of either the Superintendent of Insurance of the State of New York or the Court. Since 1925 the company has been in liquidation. The liquidation proceeding has not yet been completed and the Superintendent of Insurance, as Liquidator, is still in control and but for this action would have completed his duty as directed by the Court of Appeals in 1931 (255 N. Y. 415) and paid those claimants whose claims have long since been allowed.

*Affidavit of John M. Downes, Read in Support
of Motion.*

There being no issues of fact to be tried, it is respectfully submitted that the complaint herein be dismissed and that an order be made granting judgment to the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York as Liquidator of the domesticated United States Branch of the First Russian Insurance Company Established in 1827, together with costs.

JOHN M. DOWNES.

Sworn to before me this
17th day of May, 1939.

ELIZABETH SAWYER .

Notary Public, Kings County, N. Y.

Kings County Clerk's No. 29

N. Y. County Clerk's No. 156

Term Expires March 30, 1940

Summons Read in Support of Motion.**SUPREME COURT****NEW YORK COUNTY,**

[SAME TITLE]

Plaintiff designates New York County as place of Trial.

To the Above-Named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: November 16, 1937.

LAMAR HARDY,

United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,

Office & P. O. Address,

United States Courthouse,

Foley Square,

Borough of Manhattan,

New York City.

Complaint Read in Support of Motion.**SUPREME COURT****NEW YORK COUNTY**

55

[SAME TITLE]

The United States of America, hereinafter called the plaintiff, by its attorney, Lamar Hardy, United States Attorney for the Southern District of New York, for its complaint herein alleges upon information and belief:

1. The plaintiff, United States of America, is a corporation sovereign and body politic. 56

2. The defendant, Louis H. Pink, hereinafter called the Superintendent of Insurance, is the Superintendent of Insurance of the State of New York.

3. The First Russian Insurance Company, established in 1827, hereinafter called the Insurance Company, prior to 1918 was a corporation organized and existing under the laws of the Empire of Russia and authorized to conduct the business of insurance. 57

4. The defendants, other than the Superintendent of Insurance, are the alleged policy holders and creditors of the Insurance Company who have presented claims against the Insurance Company to the defendant Superintendent of Insurance in

Complaint Read in Support of Motion.

the proceeding (1925 No. 26150) pending in this Court, hereinafter called the liquidation proceeding, entitled "In the Matter of the Liquidation of the First Russian Insurance Company Established in 1827", and, as such claimants, are represented in the liquidation proceedings by various attorneys as follows: Victor Yermaloif, Alexander Moslenikoff, Sergei Nicolaevitch Serrebrenikoff, G. Frank Dougherty, assignee of several claimants as more fully appears in the caption herein, Nicolai P. Kotuchno, assignee for Alexander Comradi, George J. Hadjinoff, assignee for several claimants as more fully appears in the caption herein, by Engelhard, Pollak, Pitcher & Stern, Esqs.; Munich Reinsurance Co., by John J. Cuneen, Esq.; Northern Assurance Co. Ltd. Liverpool & London & Globe Insurance, North British & Mercantile Insurance Co. Ltd., Phoenix Assurance Co. Ltd., Alliance Assurance Co. Ltd., by Rumsey & Morgan, Esqs.; Frederick B. Campbell and Campbell & Whipp, Lounsbury D. Bates, assignee of Russian Reinsurance Company, by Campbell & Whipp, Esqs.; Michael Imchanitzky by George Frankenthaler, Esq.; Giles J. Swan, assignee of several claimants as more fully appears in the caption herein, by Cabell, Ignatius & Lown, Esqs.; James A. Tillman, in person; Jacob Bermant, by Morris Zwörling, Esq.; Abraham Moses Rabinowitz, in person; Maria and David Barbosh, by Louis Lende, Esq.; Eli Powsner, by Jerome Renitz, Esq.; Wolf B. Shulman, by Harry B. Lader, Esq.; Hamshev Judas Kalomoitzév, Isaac Maise and Etna Zalmon Miliowsky, Szyman, Abeg's

Complaint Read in Support of Motion.

son Leuffman, Oscar Baselgia, Georg Brusendorff, Ludwik Kapytowski, Tewel and Lejba Kewes, Alex Heinapuu, Carl E. Schneider, Zygfryd Englisch, Alexander Gherman, assignee of, and attorney in fact for, several claimants as more fully appears in the caption herein, Boris M. Komar, attorney in fact for Joseph Thomas Ludwig Silpop and Maurycy Frenkiel, Boris Katz, attorney in fact for Lieba Ietzek and Leo Issakomitz Pliss, Zygfryd Englisch, assignee of Israel Bender, George Diamond, attorney in fact for Jacob David Diamant, Benjamin N. Kraut, by Boris Komar, Esq.; Felix Falks, Paul von Firks, Mary Krusenstiern, R. Mixx, Hermann, Heimberg, Johann Poo, Gustav Kuett, Olja Bergmann, Arved Rosenstein, Yuldver, Harry Carl Redelien, J. Westholm, Alexander Gabis, Marcell Wolanowski, Emil Fable, Chr. Heiduck, Victor Malm, Alexander Luck, Samson Selig, assignee and attorney in fact for several claimants as more fully appears in the caption herein, Andrew Ditmar, assignee of several claimants as more fully appears in the caption herein, by Samson Selig, Esq.; Ruth A. Lippner, assignee of several claimants as more fully appears in the caption herein, Hannah Warshaw, assignee of several claimants as more fully appears in the caption herein, Arthur Sadde, attorney in fact for Hans Sadde, by Szold, Perkins & Brandwen, Esqs.; Charles Recht, attorney in fact for several claimants as more fully appears in the caption herein, by Charles Recht, Esq.; Helen Marsh, attorney in fact for Schmul Abromovich Glogowski, by Hellinger & Reichart, Esq.; Marks F. Paskes in his own behalf; Nina E. Hillquit, by Morris Hillquit,

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Complaint, Read in Support of Motion.

Esq.; Zygfryd Englisch, by Blum & Jolles, Esqs.; Francis J. Donnelly, by Bonyng & Barker, Esqs.; Dorothy Weidenfeld, by Kurzman & Frank, Esqs.; Bessie Smith, by Nordlinger & Riegelman, Esqs.; Anna Binder, by Maximillian L. Blek, Esq.; Paul E. Tuthill, attorney in fact for several claimants as more fully appears in the caption herein, by Paul E. Tuthill, Esq.; Aaron Sroulevitch, attorney in fact for Thel Kelmanovitch Sroulevitch, in his own behalf; Solon Friede, by Isidore Witkind, Esq.; Abram Fialke, by Samuel Fine, Esq.; Samuel Jacob Goldman, by Jacob Chaitkin, Esq.; Shneer Meyrowitz, by George Lion Cohen, Esq.; Mollie Pineles, by Jeremiah C. Lazar, Esq.

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5. The plaintiff possesses and asserts sovereign right, title and interest under the constitution, laws, treaties, executive agreements, international compacts, and authority of the United States in and to the fund which is the subject of this action, as more particularly set forth hereinafter in this complaint.

6. In or about 1907 the Insurance Company established in the United States and in the State of New York a domesticated United States branch, in compliance with the laws of the State of New York, and was thereupon authorized by the State of New York to transact and thereafter did transact business in this State and elsewhere in the United States under reciprocal laws then in force in other States of the United States.

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7. The Insurance Company then and thereafter engaged in the business of fire and reinsurance in

Complaint Read in Support of Motion.

the United States until 1918 or thereabouts and had certain cash securities and other assets in the State of New York, and as part of its compliance with the laws of the State of New York had deposited with the then Superintendent of Insurance certain of the said cash securities and other assets as a fund out of which should be paid the claims of all persons, hereinafter called domestic creditors, who transacted business with the domesticated United States branch of the Insurance Company. 67

8. In 1918 and thereabouts, the Russian Government, by its laws, decrees, enactments, and orders including among others a decree dated April 18, 1918, regarding the registration of securities, a decree dated November 28, 1918, on the organization of the insurance business, a decree dated March 4, 1919, on the liquidation of state enterprises, and a decree of November 18, 1919, on the annulment of life insurance contracts, among others, proclaimed the business of insurance in all of its forms to be a monopoly of the Russian State; dissolved, terminated, and liquidated all Russian insurance companies and organizations; nationalized all of the property and assets of every kind and wheresoever situated of all Russian insurance companies and organizations; discharged, cancelled, extinguished, and annulled all of the debts and liabilities of all Russian insurance companies and organizations; discharged, cancelled, extinguished, and annulled the shares in, and the rights of all shareholders in and to, all the property and assets of all Russian in- 68 69

Complaint Read in Support of Motion.

70 insurance companies and organizations; and discharged, cancelled, extinguished and annulled all of the obligations and liabilities of all insurance companies and organizations to all of their shareholders.

71 9. The First Russian Insurance Company, established in 1827, which prior to 1918, as alleged hereinbefore, was a corporation organized and existing under the laws of the Russian State, by the said laws, decrees, enactments, and orders of the Russian Government was dissolved, terminated, and liquidated, and all of its property and assets of every kind and wheresoever situated, including the aforesaid assets in New York, were nationalized and all of its debts, liabilities, and obligations to all of its creditors and shareholders, including the alleged debts, liabilities, and obligations to creditors who are defendants in this action were discharged, cancelled, extinguished and annulled.

72 10. As a result of said duly enacted laws, decrees, enactments and orders of the Russian Government, the said cash, securities and other assets of the insurance Company in the United States and in the State of New York became the property of the Russian Government and remained the property of the Russian State at all times up to November 16, 1933, as hereinafter set forth.

11. On or about February 24, 1924, an action was commenced in the Supreme Court, New York County, by the Insurance Company and Paul Ka

Complaint Read in Support of Motion.

sor, the former United States manager of the Insurance Company, against the Superintendent of Insurance to compel the Superintendent of Insurance to deliver to Paul Rasor securities deposited with the Superintendent of Insurance to obtain authority and permission for the Insurance Company to do business in New York and in the United States. Judgment was rendered therein directing the defendant to surrender to the plaintiff, Paul Rasor, part of the said securities of the par value of \$150,000. That judgment, as modified by the Appellate Division (212 App. Div. 561), was affirmed by the Court of Appeals (240 N. Y. 601) which denied a motion for reargument (240 N. Y. 643). Thereafter the said securities of the par value of \$150,000 were delivered to Paul Rasor on July 14, 1925.

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12. In the proceeding now pending in the Supreme Court, New York County and entitled "*In the Matter of the Application of the People of the State of New York by James A. Beha, Superintendent of Insurance of the State of New York for an Order to Take Possession of the Property and Conserve the Assets for the Benefit of the Creditors of the First Russian Insurance Company, Established in 1827, and the Interests of its Policyholders, Creditors, Stockholders and the public*", an order of this Court, dated and entered on August 8, 1925, resettled by an order dated and entered on September 11, 1925, directed the Superintendent of Insurance and his successors in office forthwith to take possession of the property and conserve the assets in the United States of the

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Complaint Read in Support of Motion.

76 Insurance Company (with the exception of the securities of the value of \$150,000 hereinbefore mentioned, and delivered to Paul Rasor on July 14, 1925), directed the Superintendent of Insurance to determine and report the claims of policyholders and creditors in the United States of the Insurance Company and of the United States branch of the Insurance Company, and restrained all creditors and policyholders from bringing any action or proceeding or in any way interfering with the Superintendent's control of the Insurance Company's property. Thereafter, the Superintendent of Insurance took possession of all of the assets of the domesticated United States branch of the Insurance Company (with the exception of the said securities of the value of \$150,000) and proceeded to determine the claims of creditors of the Insurance Company.

78 13. The first report, audit and petition of the Superintendent of Insurance as liquidator of the domesticated United States branch of the Insurance Company dated August 11, 1927, and filed in the office of the Clerk of New York County on August 18, 1927, stated in a recapitulation of assets and debts that the market value on August 8, 1927 of the assets of the Insurance Company received and recoverable by the Superintendent of Insurance was \$1,362,982.97 and that of the total claims filed in the amount of \$794,693.98, claims of \$30,655.68 had been allowed, undetermined claims of \$10,000 had been allowed as valid and the remaining claims of \$754,038.30 had been disallowed, including domesticated claims of \$5,500.

Complaint Read in Support of Motion.

foreign claims of \$738,147.73 and attachment claims of \$10,390.57, which left a prospective surplus of \$1,322,327.29.

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14. An order of this Court dated December 5, 1927, and entered on December 6, 1927 in the aforesaid liquidation proceeding confirmed the said first report of the Superintendent of Insurance, except that the order referred all objections to disallowances and classifications of claims in the first report to a referee to take evidence and report to the Court thereon, and appointed two receivers of the property of the Insurance Company and directed the Superintendent immediately to surrender and deliver to the receivers the surplus fund remaining in his possession after payment of all local domestic policyholders of the "First Class" as defined by the Court of Appeals (*Matter of People, Norske Lloyd Insurance Co., Ltd.*, 242 N. Y. 148). An order of the Appellate Division, dated March 30, 1928, with opinion (223 App. Div. 378) modified the order of this Court by reversing the provision with respect to a receivership. No appeal was taken to the Court of Appeals from the determination of the Appellate Division and objections to the disallowances and classifications of claims in the first report were brought on before a referee.

80

15. The second report, audit and petition of the Superintendent of Insurance, dated May 22, 1929 and filed May 31, 1929, stated that there was a prospective surplus of \$1,335,653.73 available for distribution and suggested that such surplus should be held until diplomatic recognition of the Government of Russia by the Government of the United

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Complaint Read in Support of Motion.

82 State and that such surplus should be transmitted or distributed in accordance with directions and decrees of this Court, made pursuant to the laws and public policy of this State and the treaty obligations of the United States.

83 16. An order of this Court, dated and entered September 9, 1929, pursuant to a decision dated July 26, 1929, confirmed the second report of the Superintendent of Insurance and referred the question of distribution of the surplus pursuant to the suggestion and plan of the Superintendent of Insurance to the referee for determination. An order of this Court, dated and entered September 10, 1929, upon the decision of the referee directed the Superintendent of Insurance to continue to hold the surplus fund. An order of the Appellate Division, filed June 11, 1930, with opinion (229 App. Div. 637) affirmed that order of this Court dated September 10, 1929, continued in force the injunction contained in the order of this Court of August 8, 1925 and directed the Superintendent of Insurance to retain the surplus funds

84 " * * * until the Government in Russia is recognized by the United States or until the surplus funds may be transmitted to a liquidator or legal representative of the corporation at the domicile abroad or in accordance with any provision of a Treaty of the United States."

On February 10, 1931, the Court of Appeals rendered a decision (255 N. Y. 415) which reversed the said order of the Appellate Division, dissolved the injunction and directed that the surplus fund

Complaint Read in Support of Motion.

be paid over to a quorum of the directors of the Insurance Company, in accordance with the decision, after payment of foreign creditors who filed claims with the Superintendent of Insurance before entry of the order or judgment on the remittitur of the Court of Appeals on the decision (256 N. Y. 131). The order on remittitur, dated and entered June 16, 1931, resettled on July 13, 1931, vacated the injunction and directed the Superintendent of Insurance, after payment of any domestic creditors who had not been paid, to determine foreign claims theretofore filed on which attachments had been obtained prior to the order dated August 8, 1925, and to determine other foreign claims.

85

17. The third report, audit and petition of the Superintendent of Insurance, dated January 20, 1932, and filed on February 5, 1932, for the period of time from March 7, 1929 to June 16, 1931, was confirmed by an order of this Court, dated and entered on May 13, 1932, which determined the surplus assets to be cash and securities in the sum of \$1,333,198.42 on June 16, 1931 after payment of all domestic creditors, ordered that foreign claims which had theretofore been filed with the Superintendent of Insurance as liquidator of the Insurance Company on or before June 16, 1931, be disallowed in the domestic liquidation, but provided that these foreign claims might be thereafter proven in the liquidation proceeding pursuant to the decision of the Court of Appeals (255 N. Y. 415) and decreed that there were no surplus assets against which further attachments might be levied or available for distribution to a quorum of the directors of the Insurance Company.

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87

Complaint Read in Support of Motion.

18. The fourth report, audit and petition of the Superintendent of Insurance, dated and filed November 9, 1933, stated that pursuant to the authority of the said decision of the Court of Appeals (255 N. Y. 415), claims based on policy contracts not made with the domesticated United States branch of the Insurance Company, including 1168 life insurance policies, 17 accident insurance policies and 3 fire insurance policies, and claims of approximately 30 general creditors on reinsurance agreements or for services rendered as directors or employees or representatives of the Insurance Company, were presented to the Superintendent of Insurance as liquidator prior to June 16, 1931.
- 88 This fourth report set forth that the said policy claims might be evaluated under a proposed Formula Number 1, based on the theory that the Insurance Company as a whole became insolvent on December 1, 1918, the date of publication of the aforementioned Soviet decree on the organization of the insurance business, dated November 30, 1918, and nationalizing the Insurance Company, and that the available assets should be distributed on the basis of the value of the policy contracts on December 1, 1918, without reference to the effect of subsequent mortality or other events in maturing certain of the insurance policy contracts and terminating certain annuities.
- 89 The Superintendent of Insurance recommended the evaluation of the policies under this Formula Number 1. The fourth report also set out an alternative method of evaluation, Formula Number 2, based on the theory that the insurance policy contracts continued to maturity according to their terms to the extent of a reduced
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Complaint Read in Support of Motion.

amount of insurance based upon the actual premiums paid in view of the fact that premium payments were discontinued. The fourth report recommended that the policies should be valued under Formula Number 1 at \$0.15 a ruble as of December 1, 1918 and that as soon as practicable without delay a dividend not exceeding 100% of the policy claims as allowed at the rate of \$0.15 a ruble should be paid to be applied as a dividend on the policy claims if another formula of evaluation should be directed.

91

The fourth report recommended the allowance and payment of various policy and other claims of foreign origin and the disallowance or suspension of various other policy claims and other claims of foreign origin.

92

19. On November 16, 1933, by an agreement as set forth in an exchange of diplomatic correspondence between the President of the United States and the Commissar for Foreign Affairs of the Union of Soviet Socialist Republics coincident with diplomatic recognition of the Soviet Government by the United States Government, a copy of which correspondence is annexed as Exhibit 1 to this complaint and made a part hereof as if set forth in full herein, the Union of Soviet Socialist Republics assigned to the plaintiff all amounts admitted to be due or that may be found to be due to the Union of Soviet Socialist Republics, including the entire said surplus assets involved in this action. Since November 16, 1933 the plaintiff has been and now is the sole and exclusive owner and entitled to immediate possession of the said surplus assets.

93

Complaint Read in Support of Motion.

94 20. An order of this Court dated and entered December 13, 1933 confirmed the said fourth report of the Superintendent of Insurance dated November 9, 1933 and ordered payment of a 100% dividend on the allowed policy claims evaluated under Formula Number 1 at \$0.125 a ruble without interest. Thereupon the said payments on account were made and the question of further payments based on evaluation of the policy claims under another formula and on allowance of interest were suspended pending further litigation.

95 21. An order of this Court dated and entered on March 13, 1934 ordered that the issues presented by the motion to confirm the fourth report and not decided by the order of this Court dated and entered December 13, 1933, and the issues raised by objections to the fourth report, be referred to a referee to hear and take evidence on the said issues and to report to this Court thereon. A further order of this Court dated and entered on December 6, 1934 referred two additional claims to the referee to hear and report.

96 22. On November 14, 1934 a suit in equity was commenced in the United States District Court for the Southern District of New York by the plaintiff in this action against the then Superintendent of Insurance, entitled "*United States of America v. George S. Van Schaick, Superintendent of Insurance of the State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827*". The bill of complaint therein alleged that the United States was the sole and exclusive owner

Complaint Read in Support of Motion.

of the entire surplus fund held by the Superintendent of Insurance and prayed that the Superintendent of Insurance be required to make an accounting and to pay over the entire surplus fund to the United States. Dismissal of the bill complaint by a decree of the District Court dated December 20, 1934, for failure to state a cause of action, on the ground that the claim of the United States was against the public policy of the State of New York (10 Fed. Supp. 269) was affirmed by an order of the Circuit Court of Appeals dated May 27, 1935 (77 F. (2d) 881). By an order of the Supreme Court of the United States dated January 6, 1936 (296 U. S. 463) the decree of the Court below was affirmed, solely on the ground that the District Court lacked jurisdiction of the suit, because the fund was in the custody of the State Court. The Supreme Court further ruled that the United States must invoke the jurisdiction of this Court in order to determine its claim to the surplus fund. 97 98

23. The report of the referee appointed pursuant to the said order of this Court dated March 13, 1934 was dated January 25, 1936 and was filed on January 27, 1936 and provided that the policy claims should be paid pursuant to Formula Number 1 with interest thereon from December 1, 1918 and that interest should be paid on other allowed claims at 6% per annum from December 1, 1918. 99

24. Following the said determination of the Supreme Court of the United States on January 6, 1936 and by an order to show cause dated February 4, 1936 in the said liquidation proceeding in

Complaint Read in Support of Motion.

100 this Court, the United States made a motion in the said liquidation proceeding for an order restraining the Superintendent of Insurance, pending final determination of the rights of the United States to the entire surplus fund, from paying out any part of the entire surplus fund, adjudging that the proceeding before the Superintendent of Insurance to determine other claims to the surplus fund be terminated immediately, adjudging that judgments in favor of alleged creditors of the Insurance Company be vacated, and adjudging that the United States was the sole and exclusive owner entitled to immediate possession of the entire fund. An order of this Court dated and entered on March 14, 1936 denied this motion of the United States "without prejudice to the institution of the time-honored form of action". An order of the Appellate Division dated and filed June 30, 1936 without opinion affirmed the said order of this Court dated March 14, 1936. The Appellate Division by an order dated and filed October 23, 1936, and the Court of Appeals by an order of December 1, 1936 denied motions of the United States for leave to appeal to the Court of Appeals.

101

25. An order of this Court dated and entered on March 30, 1936 in the said liquidation proceeding confirmed the said report of the referee filed on January 27, 1936 and ordered that, pending final determination of an action to be hereafter instituted by the United States with all convenient speed, payment of any allowed claims in the said proceeding be stayed until further order of the Court. An order of the Appellate Division dated and filed February 26, 1937 affirmed the said order

102

Complaint Read in Support of Motion.

of March 30, 1936 without opinion and the decision of the Court of Appeals on May 25, 1937 affirmed the order of the Appellate Division without opinion.

103

26. Unless the right and title of the plaintiff to the entire surplus fund, after payment of domestic creditors who already have been paid in full, is determined in this action, applications will be made in the said liquidation proceeding to modify the stay of payment of claims in the said order of this Court dated March 30, 1936 and demands will be made upon the Superintendent of Insurance to pay out the entire surplus fund of over \$1,000,000. Thereupon, the plaintiff will be deprived of its right to obtain an adjudication of its title to the entire surplus fund before distribution to numerous claimants, and plaintiff's rights will thereby be defeated. Therefore, the plaintiff is threatened with great, immediate and irreparable damage to its property rights, and the necessity will arise for a multiplicity of suits by the plaintiff against numerous claimants involving the same questions after distribution of the surplus fund in order to enforce the rights of the plaintiff to the surplus fund.

104

27. The plaintiff has no adequate remedy at law, or otherwise, to determine its right and title to the entire surplus fund unless this Court grants the relief now prayed herein.

105

28. The plaintiff has not sought the relief prayed herein, except as alleged above, from any other court or judge.

Complaint Read in Support of Motion.

Wherefore, the plaintiff prays:

106

(1) That the Superintendent of Insurance be restrained permanently and pending final determination of the plaintiff's rights in this action from distributing any part of the said entire surplus fund to anyone other than the plaintiff.

(2) That all further proceedings in the said liquidation proceedings in this Court be stayed pending final determination of the rights of the plaintiff in the action.

107

(3) That this Court vacate and set aside all judgments of this Court whatsoever of creditors other than the aforesaid domestic creditors.

(4) That this Court adjudge and determine that the plaintiff is the sole and exclusive owner entitled to immediate possession of the entire surplus fund, and direct the Superintendent of Insurance to act for and to pay over to the plaintiff the entire surplus fund.

108

(5) That an order be entered for the service of the summons and this complaint by publication upon the said defendants herein and upon anyone claiming, or having, an interest in the subject of this action, who are not found after due diligence within the jurisdiction of this Court in this action.

(6) That the plaintiff be granted such other and further relief as the Court may deem just and proper in the premises.

LAMAR HARDY,

United States Attorney for the
Southern District of New York.

Attorney for Plaintiff.

(Verified November 16, 1937, by Leon E.
Spencer.)

36

EXHIBIT 1 ANNEXED TO COMPLAINT.

Washington,

November 16, 1933.

106a

My dear Mr. President:

Following our conversations, I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

107a

108a

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claims with respect to:

Exhibit 1 Annexed to Complaint.

106b

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

107b

I am, my dear Mr. President,

Very sincerely yours,

MAXIM M. LITVINOV,

People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

Mr. Franklin D. Roosevelt,
President of the United States of America,
The White House.

108b

Exhibit 1 Annexed to Complaint.

THE WHITE HOUSE
Washington

November 16, 1933.

106c

My dear Mr. Litvinov:

I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

"The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of the their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

107c

108c

Exhibit 1 Annexed to Complaint.

106d

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or

107d

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

108d

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

Mr. Maxim M. Litvinov,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics."

**Answer of Defendant Louis H. Pink,
Superintendent of Insurance. Read
in Support of Motion.**

109

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

Louis H. Pink, Superintendent of Insurance of the State of New York as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827, by his attorney John M. Downes, answering the complaint in this action, alleges:

110

1. On information and belief admits the allegation contained in Paragraph numbered 3 of said complaint.

2. Denies each and every allegation contained in Paragraphs numbered 5, 9, 10, 26 and 27 of said complaint.

3. Denies each and every allegation contained in Paragraph numbered 7 of said complaint, except that upon admission of the First Russian Insurance Company Established in 1827 to do business in the State of New York and the establishment of its United States Branch, said insurance company deposited assets in and with the State of New York pursuant to and as required by the laws of the State of New York.

111

Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

112 4. Denies each and every allegation contained in Paragraph 8 of said complaint, except that commencing in 1918 or thereabouts the Russian Socialist Federated Soviet Republic issued and promulgated various decrees, laws, enactments and orders.

113 5. Denies each and every allegation contained in Paragraph 19 of said complaint in so far as it is therein alleged that any correspondence, agreement or assignment entered into between the Government or President of the United States and the Commissar for Foreign Affairs of the Union of Soviet Socialist Republics or the Russian Government on November 16, 1933, or at any other time, assigned the surplus assets in possession of the Superintendent of Insurance as Liquidator of the First Russian Insurance Company, Established in 1827 to the plaintiff, or that the plaintiff has been or now is the sole and exclusive owner or entitled to possession of said surplus assets, and further denies that the Union of Soviet Socialist Republics ever had any right, title or interest in or to the surplus assets in this action purported to have been so assigned.

114 FOR A FIRST SEPARATE, COMPLETE AND DISTINCT DEFENSE TO THE ALLEGED CAUSE OF ACTION STATED IN THE COMPLAINT IN THIS ACTION DEFENDANT ALLEGES:

6. That the First Russian Insurance Company Established in 1827 was established and organized

Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

in the year mentioned under the laws of the former Empire of Russia. That said company was licensed and admitted to transact the business of fire insurance in the State of New York in or about the year 1907 and from then until shortly prior to 1925 continued to transact such business in the State of New York and in other States of the United States under annual licenses issued by the Superintendent of Insurance of the State of New York and the Insurance Departments of other States.

115

7. That by an order of the Supreme Court of the State of New York, New York County, dated August 8, 1925 as resettled by an order dated September 11, 1925, and pursuant to Section 63 of the Insurance Law of the State of New York, the Superintendent of Insurance took possession of the assets of the United States Branch of said First Russian Insurance Company Established in 1827, and pursuant to orders and directions of the said Supreme Court and Section 63 of the Insurance Law, the said Superintendent of Insurance investigated, ascertained, fixed and determined the claims of policyholders and creditors of the said company in the United States and paid such of said claims as were found to be valid. That after payment of such policyholders and creditors in the United States a substantial surplus of assets belonging to the United States Branch of the First Russian Insurance Company Established in 1827 remained in possession of the liquidator. That the government of Russia, between November 1917 and November 16, 1933, was unrecognized by the government of the United

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Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

118 States of America. That the Court of Appeals of the State of New York, by its decision in the proceeding entitled,

"In the Matter of the Application of the People of the State of New York, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the First Russian Insurance Company Established in 1827, and the interests of its policyholders, creditors, stockholders and the public,"

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on February 10, 1931 rendered its decision reported in 255 N. Y. 415, in and by which it was directed that the surplus funds of the United States Branch of the First Russian Insurance Company remaining after payment of policyholders and creditors of said United States Branch should be applied by the liquidator to the liquidation of all valid claims against the First Russian Insurance Company Established in 1827 arising from business transacted by the said company outside of the United States, and that any balance of such surplus then remaining should be available to any other creditors of the company who had not filed claims with the liquidator, for attachment or execution, and that any balance of surplus then remaining should be paid and delivered to the First Russian Insurance Company Established in 1827 as represented by its surviving directors constituting a quorum of the Board. That an order of the New York County

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Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

Supreme Court upon the remittitur of said decision of the Court of Appeals making the order and judgment of the Court of Appeals the order and judgment of the New York County Supreme Court was entered on June 16, 1931. That on November 9, 1933 the Superintendent of Insurance filed in the office of the Clerk of the County of New York his Fourth Report, Audit and Petition showing the progress of the liquidation directed by the Court of Appeals (255 N. Y. 415) and the order of the New York County Supreme Court on the remittitur of said decision entered June 16, 1931 as resettled by an order of July 13, 1931. That said Fourth Report, Audit and Petition was confirmed by an order of the New York County Supreme Court entered December 13, 1933, which confirmed allowances of hundreds of claims by the liquidator and directed payment thereof. Those allowed claims were thereupon paid as directed. Certain claims and matters covered in said Fourth Report, Audit and Petition were expressly reserved by the Court for further consideration, and such reserved matters were thereafter referred to a referee to hear and report by an order of this Court dated March 13, 1934. That said referee in and by his report dated January 20, 1936 and filed January 27, 1936 reported and recommended that fifty-three (53) certain claims varying in amounts from \$100.00 to \$174,281.71, other than those allowed and paid by and pursuant to the order dated December 13, 1933 confirming the Fourth Report, Audit and Petition of the Superintendent of Insurance, should be allowed and paid, and further reported and recommended

Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

124 that allowed claims be valued and paid pursuant to Formula #1 of said Fourth Report, Audit and Petition, and that interest be paid on such policy claims from December 1, 1918 as well as on other claims set forth in the report, audit and petition and in the report of said referee. That the United States of America, the plaintiff in this action, filed objections to said referee's report and argued in opposition to the motion to confirm the same, and that said referee's report was confirmed by order of this Court dated March 13, 1936, in and by which said claims were allowed and directed to be paid as recommended by said referee, and no appeal from
125 said order was taken by said plaintiff.

8. That payment by the liquidator of interest on allowed and paid claims and payment of claims and interest allowed in and by the order of this Court dated March 13, 1936 confirming the report of the referee has been withheld because of the restraining provisions contained in said order pending final determination of an action to be thereafter instituted by the United States of America, the plaintiff herein, with all convenient speed.

126 9. That the Superintendent of Insurance of the State of New York has been ordered and directed by the Court of Appeals of the State of New York, in its decision aforesaid (255 N. Y. 415), and the order on remittitur of said decision made by this Court dated June 16, 1931 as resettled by an order dated July 13, 1931, the order of this Court dated May 13, 1932 confirming the Third Report, Audit

Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

and Petition, the order of this Court confirming the Fourth Report, Audit and Petition dated December 13, 1933, as well as by the order of March 13, 1936 confirming the report of the referee and other orders of this Court entered since February 10, 1931, to dispose of and pay the surplus assets in his possession to claimants and other parties as in said decision and orders provided.

127

10. That the said decision of the Court of Appeals reported in 255 N. Y. 415 and the order of this Court on the remittitur thereof, completely and with finality directed and fixed disposition of the surplus assets in this proceeding, and said order on remittitur and the subsequent orders of this Court carrying out the disposition of said assets as directed and prescribed by the Court of Appeals are final orders which cannot be disturbed or set aside by the agreement made upon recognition of the present Russian Government on November 16, 1933.

128

11. That in and by the agreement or alleged assignment from the Union of Soviet Socialist Republics to the plaintiff referred to in the complaint in this action and particularly paragraph 19 thereof upon which the claim of the plaintiff herein is predicated, it is specifically provided that the government of the Union of Soviet Socialist Republics agrees not to take any steps to enforce any decisions of courts or to initiate any new litigations for the amounts admitted to be due and that may be found to be due it as the successor of prior

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Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

130

governments of Russia, or otherwise, and further agrees not to make any claim with respect to judgments that might be rendered by American courts insofar as they relate to property or rights or interest therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest, and agrees not to make any claim with respect to acts done or settlements made by or with the government of the United States of public officials of the United States or its nationals relating to property, credits or obligations of any government of Russia or nationals thereof.

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12. That the claimants and parties to the liquidation whose claims have already been allowed and paid but upon whose claims interest has been withheld because of the intervention of the plaintiff herein, as well as those claimants and parties whose claims have been allowed but not paid, have vested rights and interests in the surplus assets in the possession of the liquidator, which rights and interests were vested in them prior to the recognition of the present Russian Government by the United States of America. That to deprive such claimants of their property, rights and interests would violate and be contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States.

13. That by reason of the matters set out in paragraphs 6, 7, 8, 9, 10 and 11 hereof and the agreement of the plaintiff's assignor in its agreement

Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

and purported assignment to the plaintiff as aforesaid, and the acceptance thereof by the plaintiff, the plaintiff and the plaintiff's assignor waived any claim or claims to the assets in suit in this action and are now in all respects barred and estopped to assert the same. 133

FOR A SECOND SEPARATE, COMPLETE AND DISTINCT DEFENSE TO THE ALLEGED CAUSE OF ACTION STATED IN THE COMPLAINT IN THIS ACTION DEFENDANT ALLEGES:

14. The alleged agreement or assignment referred to in Paragraph 19 of the plaintiff's complaint, if it was in fact intended thereby to assign the assets of the First Russian Insurance Company Established in 1827 held by the Superintendent of Insurance of the State of New York as liquidator of the First Russian Insurance Company Established in 1827, was expressly conditioned upon a final settlement of the claims and counterclaims between the governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, and on information and belief the negotiations for the settlement of such claims and counterclaims have been terminated without any settlement having been arrived at, and the conditions of the said agreement or assignment have not been complied with and said agreement or assignment is now in all respects null, void and unenforceable. 134 135

Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

136 FOR A THIRD SEPARATE, COMPLETE AND DISTINCT
DEFENSE TO THE ALLEGED CAUSE OF ACTION STATED
IN THE COMPLAINT IN THIS ACTION DEFENDANT
ALLEGES:

137 15. Under and pursuant to various laws, decrees,
enactments and orders of the Russian Government,
among which are a decree dated October 27, 1931
(Collection of Laws and Orders of the Worker's
and Peasant's Government, December 5, 1921, #72,
published by the People's Commissariat of Justice),
a decree dated December 10, 1921 (Collection of
Laws, etc., 1921, #79, Article 684), and a decision
of the Supreme Court of the Russian Socialist
Federated Soviet Republic rendered on March 11,
1923 (Judicial Practice #6, page 2), the Soviet
Law regards the nationalization decrees upon which
the plaintiff herein relies as having no effect on
property not factually taken into possession or control
by the Soviet State prior to May 22, 1922.

FOR A FOURTH SEPARATE, COMPLETE AND DISTINCT
DEFENSE TO THE ALLEGED CAUSE OF ACTION STATED
IN THE COMPLAINT IN THIS ACTION DEFENDANT
ALLEGES:

138 16. The decree of November 18, 1918 (published
December 1, 1918) upon which the plaintiff herein
bases its alleged title was operative only within
Russia. Pursuant to said decree only such assets
as were disclosed at the time of their liquidation
or remaining on hand after liquidation were to
become the property of the Russian Government.

Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

Pursuant to said decree the aforesaid liquidation was to be accomplished not later than April 1, 1919. 139

17. The Soviet law of property regards the law of the place where the property is located as the only law to be applied in determining the ownership of such property. Accordingly, various notes and circulars of the Russian Government have been promulgated, which decreed that the nationalization and confiscatory decrees were intended to be solely territorial in effect. Among such circulars and decrees are Circular #329, dated October 23, 1925, of the People's Commissariat for Foreign Affairs; Circular #42, dated April 12, 1922, of the People's Commissariat for Foreign Affairs, and Circular #194, dated September 26, 1923, of the People's Commissariat of Justice of the R. F. S. R., and decision #124 of the Third Department of the People's Commissariat of Justice interpreting the decree of November 18, 1919 on the annulment of life insurance contracts wherein it was held that "the general annulment of agreements of life insurance does not extend to the territories located without the borders of the U. S. S. R. and particularly to the United States of North America". 140

FOR A FIFTH SEPARATE, COMPLETE AND DISTINCT DEFENSE TO THE ALLEGED CAUSE OF ACTION STATED IN THE COMPLAINT IN THIS ACTION DEFENDANT ALLEGES: 141

18. The laws, decrees, enactments and orders upon which plaintiff herein bases its alleged title

Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

142 are confiscatory, and, even if the said laws, decrees, enactments and orders were intended to cover or extend to the assets in the possession of the Superintendent of Insurance of the State of New York they are contrary to the public policy of the United States of America and the State of New York and are unenforceable since they are violative of the Constitutions of the State of New York and the United States of America.

143 19. The penal code of the R. S. F. S. R. (Article 136, Collection of Laws, etc., #15 for 1922, Article 153; and Collection of Laws, etc., for 1927, #80, Article 600, Section 58, Subdivision 1 to 7 thereof), makes it a state crime punishable by forced labor to violate any of the provisions concerning state monopolies. The Soviet decrees upon which plaintiff's alleged title is based are penal decrees and unenforceable here.

•FOR A SIXTH SEPARATE, COMPLETE AND DISTINCT DEFENSE TO THE ALLEGED CAUSE OF ACTION STATED IN THE COMPLAINT IN THIS ACTION DEFENDANT ALLEGES:

144 20. The recognition agreement of November 16, 1933 provides that the United States shall notify the U. S. S. R. of the amounts collected by it by virtue of said assignment. The United States is therefore acting as the collection agency for the U. S. S. R. The United States cannot accept property by assignment or otherwise for any purpose other than governmental (Constitution, Article

Answer of Defendant Louis H. Pink, Superintendent of Insurance, Read in Support of Motion.

If Section 81, and the United States is, therefore, barred and foreclosed from asserting any title to the property in the possession of the Superintendent of Insurance of the State of New York. 145

Wherefore, this defendant demands judgment dismissing the complaint of the plaintiff herein, together with the costs and disbursements of this action.

Dated, New York, N. Y., March 24, 1938,

Yours, etc.,

146

JOHN M. DOWNES,

Attorney for Louis H. Pink; Superintendent of Insurance of the State of New York as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827.

Office & P. O. Address,
111 John Street,

Borough of Manhattan,
New York City, N. Y.

(Verified March 24, 1938, by Milton D. Loysen.)

147

**Affidavit of Leon E. Spencer, Read in
Opposition to Motion.**

**SUPREME COURT
OF THE STATE OF NEW YORK
NEW YORK COUNTY**

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss.:

Leon E. Spencer, being duly sworn, deposes and says that he is an Assistant United States Attorney in and for the Southern District of New York and has charge of the Government's case in the above-entitled action.

That this affidavit is submitted in opposition to that of John M. Downes verified on the 17th day of May, 1939, which seeks the dismissal of the complaint herein. The motion made on behalf of the Superintendent of Insurance as appears from the affidavit of John M. Downes above-referred to seeks the dismissal of the complaint in this action because of a holding by the Court of Appeals of the State of New York in the "Moscow Fire Insurance Company" case. The Court of Appeals decision in the "Moscow Fire Insurance Company" case was made on April 11, 1939. On April 15, 1939, the Government filed a motion for reargument in the Court of Appeals and also made a motion for a stay against any payments out of the fund now and then on deposit with the Bank of New York and Trust Company. The Court of Appeals under date of June 2, 1939, denied the Government's mo-

*Awdavit of Leon E. Spencer, Read in Opposition
to Motion.*

tion for reargument with respect to the decision of the Court of Appeals dated April 11, 1939, and continued the stay against any payment out of the funds of the Moscow Fire Insurance Company pending an application by the Government to the Supreme Court of the United States for certiorari to review the decision of the Court of Appeals dated April 11, 1939. 151

The Solicitor General of the United States has decided that an application for certiorari will be filed in due time with the United States Supreme Court seeking a review of the decision of the Court of Appeals dated April 11, 1939.

It is therefore respectfully submitted that the decision of the Court of Appeals of the State of New York has not become final and will remain interlocutory until the Supreme Court finally passes upon the Government's application for certiorari or if certiorari is granted by the Supreme Court, then pending the final decision on certiorari. 152

It is therefore respectfully submitted that the motion made on behalf of the Superintendent of Insurance for the dismissal of the Government's complaint in the above-entitled action is premature and should be denied or else decision thereon withheld pending the final decision of the Supreme Court in the Moscow Fire Insurance Company case, decision in which case the Superintendent of Insurance alleges as his authority for the dismissal of the complaint herein. 153

LEON E. SPENCER.

Sworn to before me this
6th day of June, 1939.

LEO COHEN

Notary Public, Kings Co. Clk's No. 267

N. Y. Co. Clk's No. 774, Bronx Co. Clk's No. 39.

Commission expires March 30, 1940

**Memorandum Decision of
Justice Aaron J. Levy.**

154

Special Term, Part III

(New York Law Journal, June 23, 1939.)

155

United States v. Pink—Motion for summary judgment dismissing the complaint is granted (Moscow Fire Ins. Co. v. N. Y. Bank & Trust Co., 280 N. Y., 286). The fact that the Court of Appeals, in the cited case, in denying the motion of the present plaintiff for reargument granted a stay pending an application to the United States Supreme Court for a writ of certiorari does not justify withholding the decision of the present motion until the decision of the latter court. Settle order.

156

Affidavit of No Other Opinion.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

157

Irvin C. Rutter, being duly sworn, deposes and says:

I am a Special Assistant to the Attorney General of the United States, and as such am in charge of this action on behalf of the plaintiff; and I am familiar with the proceedings in this action.

No opinion or memorandum was rendered by the Court in this case, except as appears in the memorandum decision of Justice Aaron J. Levy, printed herein at page 52.

158

IRVIN C. RUTTER.

Sworn to before me this
12th day of March, 1940.

JULIUS ROLNITZKY

Notary Public, Kings County
Kings Co. Clk's No. 293, Reg. No. 453
N. Y. Co. Clk's No. 884, Reg. No. 9R526
Commission expires March 30, 1940

159

Stipulation Waiving Certification.

160 Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true and correct copies of the notice of appeal, order and judgment appealed from, and all papers upon which the Court below acted in making the order and judgment appealed from and the whole thereof now on file in the office of the Clerk of the County of New York, and certification thereof by the Clerk pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated: March 12, 1940.

161

JOHN T. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for United States of
America, Plaintiff-Appellant.

JOHN M. DOWNES,
Attorney for the Superintendent
of Insurance of the State of
New York, Defendant-Appellee.

162

ADDITIONAL PAPERS

to the

COURT OF APPEALS

Notice of Appeal to Court of Appeals.

SUPREME COURT

NEW YORK COUNTY

32347/1937

163

UNITED STATES OF AMERICA,

Plaintiff,

—v—

LOUIS H. PINK, Superintendent of Insurance of the
State of New York, and as Liquidator of the
Domesticated United States Branch of the FIRST
RUSSIAN INSURANCE COMPANY, ESTABLISHED
1827, *et al.*,

164

Defendants.

SIR:

PLEASE TAKE NOTICE that pursuant to leave granted by the Appellate Division of the Supreme Court, First Judicial Department, by an order made and entered in the office of the Clerk of that Court on May 31, 1940, and as of right, the plaintiff, United States of America, hereby appeals to the Court of Appeals from each and every part of the judgment of affirmance herein entered in the office of the Clerk of the County of New York on May 18, 1940, pursuant to the order of the Appellate Division, First Judicial Department, entered in the office of the Clerk of that Court on May 17, 1940, which judgment and order unanimously affirmed the order of the Supreme Court of New York County dated

165

Notice of Appeal to Court of Appeals.

and entered in the office of the Clerk of the County of New York on June 29, 1939, and the judgment entered herein in the office of the Clerk of the County of New York on June 30, 1939, which judgment and order directed that the complaint be dismissed upon the merits in favor of the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company, Established in 1827.

Dated: New York, N. Y., June 26, 1940.

JOHN T. CAHILL,

United States Attorney for the Southern District of New York,

Attorney for Plaintiff-Appellant.

To:

JOHN M. DOWNES,

Attorney for Defendant-Respondent,

Louis H. Pink, Superintendent of Insurance of the State of New York and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established 1827.

Order of Affirmance.

At a term of the Appellate Division of the
 Supreme Court held in and for the
 First Judicial Department in the 169
 County of New York, on the 17th day
 of May, 1940.

Present:

HON. FRANCIS MARTIN,

Presiding Justice,

" IRWIN UNTERMYER,

" EDWARD S. DORE,

" ALBERT COHN,

" JOSEPH M. CALLAHAN,

Justices. 170

8740

UNITED STATES OF AMERICA;

Appellant,

—c8.—

LOUIS H. PINK, Superintendent of Insurance of the
 State of New York, and as Liquidator of the
 Domesticated United States Branch of the FIRST
 RUSSIAN INSURANCE COMPANY, ESTABLISHED
 IN 1827, impleaded etc.,

171

Respondent.

An appeal having been taken to this Court by the
 Plaintiff from a judgment of the Supreme Court,
 New York County, entered on the 30th day of

Order of Affirmance.

June, 1939 and from an order made by said Court entered on the 29th day of June, 1939, granting defendants' motion to dismiss the complaint and for summary judgment, and said appeal having been argued by Mr. Irvin C. Rutter of counsel for the appellant, and by Mr. John M. Downes of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the judgment and order so appealed from be and the same are hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter,

F. M.

Judgment of Affirmance.**SUPREME COURT
OF THE STATE OF NEW YORK****NEW YORK COUNTY**

175

County Clerk's No. 32347—1937

UNITED STATES OF AMERICA,**Plaintiff,****—against—****LOUIS H. PINK, Superintendent of Insurance of the
State of New York, and as Liquidator of the
Domesticated United States Branch of the FIRST
RUSSIAN INSURANCE COMPANY, ESTABLISHED
IN 1827, and others,**

176

Defendants.

The appeal taken by the plaintiff from the order of this Court dated and entered in the office of the Clerk of the County of New York herein on the 29th day of June, 1939 and from the judgment in the above-entitled action entered in the office of the Clerk of the County of New York on the 30th day of June, 1939, having been brought to a hearing and heard at a term of the Appellate Division of the Supreme Court, First Judicial Department, held at the Appellate Division Court House, in the Borough of Manhattan, City, County and State of New York on the 2nd day of May, 1940, and an order of said Appellate Division having been made and entered affirming said judgment and order with costs of

177

Judgment of Affirmance.

178 said appeal to the respondent, Louis H. Pink, Superintendent of Insurance and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company Established in 1827, all the Justices concurring,

Now, on motion of John M. Downes, Attorney for the respondent, it is hereby

179 ADJUDGED that said judgment and order be and the same hereby are in all things affirmed, and that the respondent, Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the United States Branch of the First Russian Insurance Company, Established in 1827 of 160 Broadway N. Y. C., recover of the appellant, United States of America of Foley Square N. Y. C., the sum of \$73.25 costs of said appeal.

Dated May 18, 1940.

ARCHIBALD R. WATSON,
Clerk.

Order Granting Leave to Appeal to the Court of Appeals.

181

At a term of the Appellate Division of the
Supreme Court held in and for the
First Judicial Department in the
County of New York, on the 31st day
of May, 1940.

P r e s e n t :

HON. FRANCIS MARTIN, *Presiding Justice*,

“ IRWIN UNTERMYER,

“ EDWARD S. DORE,

“ ALBERT COHN, ..

“ JOSEPH M. CALLAHAN,

182

Justices.

No. 15.

UNITED STATES OF AMERICA,

Appellant,

—v—

LOUIS H. PINK, Superintendent of Insurance of
the State of New York, and as Liquidator of the
Domesticated United States Branch of the FIRST
RUSSIAN INSURANCE COMPANY, ESTABLISHED IN
1827, impleaded etc.,

183

Respondent.

The above named plaintiff having moved for leave
to appeal to the Court of Appeals from the order

*Order Granting Leave to Appeal to
Court of Appeals.*

of this Court entered herein on the 17th day of May,
1940, and from the judgment entered thereon,

184

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of Irvin C. Rutter in support of said motion, and the affidavit of John M. Downes in opposition thereto, and after hearing Mr. John T. Cahill for the motion, and Mr. John M. Downes opposed,

It is hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

185

Enter,

F. M.

186

~~Affidavit of No Opinion by the Appellate Division.~~

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

187

IRVIN C. RUTTER, being duly sworn, deposes and says: I am a Special Assistant to the Attorney General of the United States and of counsel for the plaintiff-appellant in this action and I am familiar with the proceedings herein.

No opinion was rendered by the Appellate Division, First Department.

IRVIN C. RUTTER.

Sworn to before me this
1st day of August, 1940.

188

JULIUS ROLNITZKY,

Notary Public, Kings County,

Kings Co. Clk's No. 105, Reg. No. 2126,

N. Y. Co. Clk's No. 256, Reg. No. 2R170,

Commission expires March 30, 1942.

189

**Stipulation Waiving Certification of
Record to Court of Appeals.**

190 It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing consists of a true and correct copy of the record on appeal to the Appellate Division, First Department, the order of affirmance, the judgment of affirmance, and the notice of appeal to the Court of Appeals, all of which are on file with the Clerk of the Court of the County of New York, and the order of the Appellate Division, First Department, granting leave to appeal to the Court of Appeals, which is on file with the Clerk of said court.

191 Certification of all of the foregoing papers is hereby waived.

Dated: New York, N. Y., August 1st, 1940.

JOHN T. CAHILL,

United States Attorney for the
Southern District of New York,
Attorney for Appellant.

JOHN M. DOWNES,

Attorney for Respondent.

COURT OF APPEALS

STATE OF NEW-YORK, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of December, in the year of our Lord one thousand nine hundred and forty, before the Judges of said Court.

Witness:

The Hon. IRVING LEHMAN,
Chief Judge, Presiding.

JOHN LUDDEN,
Clerk.

Remittitur

December 31, 1940.

UNITED STATES OF AMERICA, APPELLANT

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ETC., IMPLD. & C., RESPONDENT

Be it remembered, that on the 1st day of October, in the year of our Lord one thousand nine hundred and forty United States of America, the appellant in this cause, came here unto the Court of Appeals; by John T. Cahill, United States Attorney for the Southern District of New York, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator etc., the respondent, in said cause, afterwards appeared in said Court of Appeals by John M. Downes, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Irvin C. Rutter, of counsel for the appellant; and by Mr. John M. Downes, of counsel for the respondent; briefs filed by amici curiae; and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be

and the same hereby is affirmed, with costs. And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

(Sgd.) JOHN LUDDEN,

*Clerk of the Court of Appeals
of the State of New York.*

COURT OF APPEALS,

Clerk's Office, Albany, December 31, 1940.

I, hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

(Sgd.) JOHN LUDDEN, *Clerk.*

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse in the Borough of Manhattan, City, County and State of New York, on the 6th day of January 1941.

Present: Hon. PHILIP J. McCook, Justice.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, DEFENDANT-RESPONDENT, VICTOR YERMALOFF, AND OTHERS, DEFENDANTS

The above-named defendant having appealed to the Court of Appeals from the judgment of affirmance of the Appellate Division of the Supreme Court for the First Judicial Department entered in the office of the Clerk of the County of New York on May 8, 1940, pursuant to the order of said Appellate Division entered in the office of the Clerk of that Court on May 17, 1940, which judgment and order unanimously affirmed

the order of the Supreme Court of New York County dated and entered in the office of the Clerk of the County of New York on June 29, 1939, and the judgment entered herein in the office of the Clerk of the County of New York on June 30, 1939, which judgment and order directed that the complaint herein be dismissed upon the merits in favor of the defendant Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the United States Branch of the First Russian Insurance Company, Established in 1827; and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment and order so appealed from be affirmed with costs; and the record remitted from that Court having been filed, Now on motion of John M. Downes, Attorney for Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827, the defendant-respondent herein, it is

Ordered that the said judgment of the Court of Appeals be and the same hereby is made the judgment of this Court; and that the judgment entered herein on the 18th day of May 1940 and said order of the Appellate Division entered herein on May 17, 1940, be and the same hereby are affirmed, and that the judgment of this Court be entered herein affirming said judgment and order, with costs of said appeal against the plaintiff to be taxed.

Enter,

(Sgd.) P. J. Mc. C.
J. S. C.

Supreme Court of the State of New York, New York County

UNITED STATES OF AMERICA, PLAINTIFF

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, DEFENDANT, VICTOR YERMALOFF, AND OTHERS, DEFENDANTS

The appeal taken by the plaintiff from the order of the Appellate Division of this Court entered in this action on the 17th day of May 1940, and the judgment of affirmance entered pursuant thereto in this action on the 18th day of May 1940, which said order and judgment affirmed the order of this Court entered herein on the 29th day of June, 1939, and the judgment of this Court entered pursuant to said last mentioned order on

the 30th day of June 1939, and the Court of Appeals having heard said appeals and ordered and adjudged that the judgment and order so appealed from be affirmed and judgment rendered for the plaintiff, with costs, and the record remitted from that Court, having been filed, and an order having been entered thereon making the judgment of the Court of Appeals, the judgment of this Court, and directing the entry of a judgment of affirmance herein with costs of said appeal against the defendant, to be taxed.

Now, on motion of John M. Downes, attorney for Louis H. Pink, Superintendent of Insurance of the State of New York and as Liquidator of the First Russian Insurance Company, established in 1827, the defendant-respondent on said appeal, it is

Adjudged, that the order entered in this action on May 17th, 1940, and the judgment entered herein pursuant thereto on the 18th day of May 1940, be and the same hereby are affirmed;

And it is further adjudged, that the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the First Russian Insurance Company, established in 1927, 160 Bway., N. Y. C., recover of the plaintiff, United States of America, Foley Square, N. Y. C., the sum of \$104.71, the amount of his costs herein as taxed, and that he have execution against said plaintiff therefor.

Dated, New York, January 7, 1941.

(Signed) ARCHIBALD R. WATSON.

Clerk.

Supreme Court of the State of New York, New York County

UNITED STATES OF AMERICA, PLAINTIFF

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, DEFENDANT, VICTOR YERMALOFF, AND OTHERS, DEFENDANTS

I, Archibald R. Watson, Clerk of the Supreme Court of the State of New York, County of New York, and Clerk of the County of New York, do hereby certify that the foregoing consists of a true, full, correct, and complete copy of the printed record on appeal to the Court of Appeals of the State of New York in the above-entitled action upon which the said Court of Appeals acted and which has been certified to this Court

by the said Court of Appeals with the remittitur of the said Court of Appeals, and a true, full, correct, and complete copy of the following papers, to wit: The remittitur and order of the Court of Appeals; the order on remittitur from the Court of Appeals; the judgment on remittitur from the Court of Appeals; all of which are on file in this office.

In witness whereof I have hereunto set my hand and affixed my seal the 10th day of February 1941.

[SEAL]

ARCHIBALD R. WATSON,

Archibald R. Watson,

Clerk.

State of New York—In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the seventh day of January A. D. 1941.

Present, Hon. IRVING LEHMAN, Chief Judge, Presiding.

UNITED STATES OF AMERICA, APPELLANT

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, RESPONDENT, VICTOR YERMALOFF, AND OTHERS, DEFENDANTS

A motion having heretofore been made herein upon the part of the appellant for a stay, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the Superintendent of Insurance stayed from paying out or distributing to anyone, pursuant to any order or judgment herein, any part of the funds held by said Superintendent of Insurance, as liquidator of the First Russian Insurance Company, except for necessary liquidation and administration expenses, pending the application by the United States of America to the Supreme Court of the United States for a writ of certiorari to review the decision of this court dated December 31, 1940, and in the event said petition for certiorari is granted, then pending the decision of this cause in the Supreme Court of the United States.

A copy.

[SEAL]

RUFUS KIMBALL,

Deputy Clerk.

STATE OF NEW YORK.

Court of Appeals, State Reporter's Office, ss:

I, Louis J. Rezzemini, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of United States v. Pink, decided by the Court of Appeals on the thirty-first day of December 1940, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 27th day of January 1941.

[SEAL]

P

LOUIS J. REZZEMINI,

*As Reporter of the Court of Appeals
of the State of New York.*

Attest:

[L. S.] JOHN LUDDEN,

Clerk of the Court of Appeals.

STATE OF NEW YORK,

Court of Appeals.

I, Irving Lehman, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that John Ludden is the Clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Louis J. Rezzemini is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of United States v. Pink, decided by the said Court of Appeals on the thirty-first day of December 1940, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of John Ludden, as clerk of said court, appended thereto is the true and genuine signature of said John Ludden, and the signature of Louis J. Rezzemini, as reporter of said court, appended thereto is the true and genuine signature of said Louis J. Rezzemini.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York on

the — day of January in the year one thousand nine hundred and forty-one.

IRVING LEHMAN,

*As Chief Judge of the Court of Appeals
of the State of New York.*

UNITED STATES OF AMERICA, APPELLANT

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, RESPONDENT, IM-
PLEADED WITH OTHERS

Decided December 31, 1940

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 18, 1940, unanimously affirming a judgment in favor of defendant-respondent entered upon an order of Special Term which granted a motion by such defendant for a dismissal of the complaint and for summary judgment.

John T. Cahill, United States Attorney (Irvin C. Rutter, Francis M. Shea, Edward J. Ennis, and Noel Hemmendinger of counsel), for appellant.

Allen W. Dulles and Inzer B. Wyatt for Association of American Creditors of Russia, amicus curiae.

John M. Downes and Alfred L. Green for respondent.

Paul C. Whipp for Surviving Directors of First Russian Insurance Company, amici curiae.

Albert G. Avery for Frederick H. Cattley et al., amici curiae.

Borris M. Komar for George Brussendorff et al., amici curiae.

Samson Selig, Abraham J. Mutter and William F. Roche for Andrew Ditmars et al., amici curiae.

Per Curiam. The judgment appealed from is in accord with the decision of this court in *Moscow Fire Ins. Co. v. Bank of New York* (280 N. Y. 286; affd., without opinion by an equally divided court, 309 U. S. 624; rehearing denied, 309 U. S. 697). Three of the judges of this court concurred in a forceful opinion dissenting from the court's decision in that case, but the decision left open no question which has been argued upon this appeal. We are agreed that without again considering such questions this court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case

the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here.

The judgment should be affirmed, with costs.

LEHMAN, Ch. J., LOUGHKAN, FINCH, RIPPEY, SEARS, LEWIS, and CONWAY, J. J., concur.

Judgment affirmed.

Supreme Court of the United States

Order allowing certiorari

Filed May 5, 1941

The petition here~~in~~ for a writ of certiorari to the Supreme Court of the State of New York is granted.

And it is further ordered that the duly certified copy of the manuscript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed and Mr. Justice Murphy took no part in the consideration and decision of this application.

FILE COPY

MAR 29 1941

No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA; PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF
THE STATE OF NEW YORK, AND AS LIQUIDATOR OF
THE DOMESTICATED UNITED STATES BRANCH OF
THE FIRST RUSSIAN INSURANCE COMPANY, ESTAB-
LISHED IN 1827; VICTOR YERMALOFF, AND OTHERS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF NEW YORK, NEW YORK
COUNTY

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827; VICTOR YERMALOFF, AND OTHERS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, New York County, entered on January 7, 1941, on remittitur from the Court of Appeals (R. 67-68).

OPINIONS BELOW.

The memorandum opinion of the Supreme Court of New York, New York County (R. 52) is not reported. Judgment of affirmance by the Appellate Division of the Supreme Court of the State

of New York in the First Judicial Department (R. 57) was entered without opinion. The *per curiam* opinion of the Court of Appeals of the State of New York (R. 71-72) has not yet been reported.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on December 31, 1940 (R. 65-66); the judgment of the Supreme Court, New York County, on remittitur from the Court of Appeals was entered on January 7, 1941 (R. 67-68). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

The decision of the court below involves a title and right specially set up and claimed by the petitioner under the Constitution, laws, authority, and a treaty of the United States within Section 237 (b) of the Judicial Code, as amended. The decision of the court below that state law, rather than federal law as the petitioner contended, determines the validity of the petitioner's title to the property involved, and that under state law alleged foreign creditors and stockholders of the former First Russian Insurance Company, and not the petitioner, are entitled to the property, involves substantial questions which, petitioner contends, were decided contrary to a directly applicable decision of this Court. *United States v. Belmont*, 301 U. S. 324. The precise question here involved

was before this Court in *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624, where the decision of the Court of Appeals of New York (280 N. Y. 286), upon which the decision in the instant case is rested, was affirmed by an equally divided court. The only difference between the two cases is that in the *Moscow* case, in which evidence was taken, there was an adverse decision below on a question of foreign law. Other cases believed to sustain jurisdiction of this Court are *United States v. Belmont*, *supra*; *United States v. Ansonia Brass &c. Co.*, 218 U. S. 452; *Stanley v. Schwalby*, 162 U. S. 255.

Petitioner raised these substantial federal questions in its original pleading in this action in the state court (R. 19, 22, 31), by appeal from the judgment against petitioner (R. 55), and by written and oral arguments on appeal which were rejected by the state appellate courts.

QUESTIONS PRESENTED

The Government asserts title to personal property in New York of a dissolved Russian Insurance Company, remaining after payment of domestic creditors and transferred by Soviet law to the Soviet Government and then assigned by international compact to the United States. Its claim that this surplus property should be delivered to the United States as assignee of the Soviet Government, and that it should be permitted to contest the claims of foreign stockholders and creditors of

the Company, depends upon the following questions:

1. Whether the Government's title and claims are to be determined by federal law or by state law.

2. Whether, under federal law, the decrees of the Soviet Government nationalizing the property of the Insurance Company located in New York must under the international compact be recognized and enforced by the courts of New York.

3. Whether the United States branch of the former Insurance Company may be regarded as a separate organization created and regulated by New York law, and whether under New York law the United States has title to this property.

STATEMENT

The United States brought the instant action against the respondent, the Superintendent of Insurance of New York, to recover the assets of the New York branch of the First Russian Insurance Company, which remained after the payment of the claims of domestic creditors. The complaint alleged that such assets had by Russian law passed

¹ The policy holders and claimants asserting rights in and to the surplus assets of the insurance company were made defendants below. Their claims are all subordinate to the right of the Superintendent of Insurance to apply the surplus assets to the payment of their claims.

to the Government of Russia and had been assigned to the United States by that Government. The complaint was dismissed for failure to state a cause of action. The material facts set forth in the bill of complaint are substantially as follows:

The First Russian Insurance Company, a corporation organized under the laws of the former Empire of Russia (R. 19), established a United States branch in the State of New York in 1907 (R. 22). In compliance with the laws of that state the company deposited with the Superintendent of Insurance of New York certain assets which were to secure the payment of all claims resulting from the transactions of the New York branch. In 1918 the Russian Government by various laws, decrees, enactments, and orders made the business of insurance in all of its forms a state monopoly, dissolved all insurance companies, and cancelled the debts of such companies and the rights of the stockholders to any claims therein (R. 23). These laws and decrees also nationalized all of the assets and property of the Russian insurance companies wherever situated (R. 23-24).

The New York branch of the First Russian Insurance Company continued to do business in New York until 1925 when the respondent took possession of its assets, pursuant to an order of the Supreme Court of New York, which directed him to determine and report upon the claims of the policyholders and creditors of the company in the

United States (R. 25-26). Thereafter, all claims arising out of the business of the United States branch of the company (hereinafter referred to as the claims of domestic creditors) were fully paid by respondent (R. 26-27) and there remained in his hands after payment of all domestic claims approximately \$1,335,653.73. (R. 27.) In determining the disposition that should be made of this surplus, the New York Court of Appeals, on February 10, 1931, directed that the respondent proceed to determine and pay claims of certain foreign creditors. 255 N. Y. 415, 423 (R. 28-29). The respondent thereupon proceeded with the liquidation of the claims of foreign creditors. From time to time certain claims have been allowed, and certain payments have been made thereon (R. 29-32). The major portion of the allowed claims have not been paid, their payment being stayed pending the disposition of the claim of the United States (R. 34).

On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the *de jure* Government of Russia and in the course of and as an incident to that recognition accepted an assignment from that Government of all claims which it had against nationals of the United States as successor to prior Governments of Russia, or otherwise (R. 31).

On November 14, 1934, while the liquidation proceedings were pending, the United States com-

menced a suit against respondent in the United States District Court for the Southern District of New York, seeking to recover the assets still remaining in the hands of the respondent, but this Court concluded that inasmuch as the *res* was in the custody of a state court, federal courts lacked jurisdiction to dispose of the controversy and remitted the United States to the state courts for the determination of its claim (R.³ 32-23). *United States v. Bank of New York & Trust Co.*, 296 U. S. 463. Thereafter, the present suit was instituted in the Supreme Court of New York.

Following the decision of the Court of Appeals of New York in the *Moscow* case, the Supreme Court of New York on respondent's motion dismissed the complaint of the United States and entered summary judgment for respondent (R. 8-9). The Appellate Division on May 17, 1940, affirmed without opinion (R. 57). On appeal pursuant to leave granted by the Appellate Division (R. 61) the Court of Appeals on December 31, 1940 (R. 71-72), affirmed in a *per curiam* opinion on the

³ Prior to the institution of the instant case, the United States moved for leave to intervene in the liquidation proceedings then being conducted by the respondent. The motion was denied on March 14, 1936, "without prejudice to the institution of the time-honored form of action" (R. 33-34). That order was affirmed by the Appellate Division without opinion on June 30, 1936, and the Appellate Division and the Court of Appeals denied motions of the United States for leave to appeal to the Court of Appeals on October 23, 1936, and December 1, 1936, respectively (R. 34).

authority of *Moscow Fire Insurance Co. v. Bank of New York*, 280 N. Y. 286, aff'd by an equally divided court, 309 U. S. 624.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals of New York erred:

1. In holding that the right of the United States, as assignee of the Soviet Government, to the surplus assets of a dissolved Russian insurance corporation is governed by the law of the State of New York.

2. In failing to hold that the right of the United States to the surplus assets as assignee of the Soviet Government is governed by federal law.

3. In failing to hold that, under federal law, the decrees of the Soviet Government nationalizing property located in the State of New York and belonging to a Russian corporate national must under the Litvinov Assignment be recognized and given effect by the courts of New York.

4. In holding that the New York branch of the First Russian Insurance Company existed as a separate and distinct corporate entity even after the dissolution of the First Russian Insurance Company by the law of the state of its creation.

5. In holding that the nationalization decrees of the Soviet Government relating to insurance companies had no effect upon surplus personal property of the dissolved Russian Insurance Company located in the State of New York.

6. In holding that the claims of stockholders of the dissolved corporation and foreign creditors thereof were superior to those asserted by the United States.

7. In holding that the Soviet Government did not become the successor to all right, title and interest of the First Russian Insurance Company.

8. In holding that the United States was not entitled to any residue of the surplus funds of the First Russian Insurance Company even if the claims of creditors and stockholders were superior to the claim of the United States.

9. In holding that under the Litvinov Assignment the rights to the surplus property which the Government seeks to enforce are subject to state law.

10. In holding that the United States as a matter of state law acquired no title to the surplus assets of the First Russian Insurance Company.

11. In holding that Section 27 of the Insurance Law of New York conferred jurisdiction upon the courts of New York to make distribution of the surplus funds of the dissolved Russian Insurance Company after all domestic creditors and claimants of that company had been paid.

12. In affirming the judgment of the Appellate Division of the Supreme Court of New York and the judgment of the Supreme Court of the State of New York dismissing the complaint.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, in affirming the dismissal of the complaint, did so on the authority of its prior decision in *Moscow Fire Insurance Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286, aff'd by an equally divided court, 309 U. S. 624. The questions involved in this proceeding are the same as those in the *Moscow* case, save that, in this case, the question whether the Soviet decrees were intended to reach the assets of Russian insurance companies located abroad is not in issue, the allegation of the complaint that the decrees extended to such assets having been admitted by the motion. Cf. *United States v. Belmont*, 85 F. (2d) 542, 546 (C. C. A. 2d), reversed on other grounds, 301 U. S. 324, 327.³ This Court having recently granted

³ The motion to dismiss the complaint in the court below was stated to be under the summary judgment provisions of Rule 113 of the New York Rules of Civil Practice, as well as on the ground that the complaint was insufficient in law (R. 10), but it is clear that no factual issue as to the Russian law was presented. The supporting affidavit expressly disclaimed any intention to raise an evidentiary issue (R. 13) and the Court of Appeals declared that "without again considering such questions this court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here" (R. 71-72). Moreover, the present action is in equity (see *103 Park Ave. Co. v. Exchange Buffet Corp.*, 203 App. Div. 739; *United States v. Manhattan Co.*, 276 N. Y. 396, 402) and, under New York practice, the issue of the construction of the Russian law could not have been presented on this motion.

certiorari in the *Moscow* case (308 U. S. 542), the reasons for granting the writ in this case need only briefly be stated here.

1. The decision below is in direct conflict with the decision of this Court in *United States v. Belmont*, 301 U. S. 324. In that case the Court held that the effect of the recognition of the Soviet Government and the Litvinov Assignment was "to validate, so far as this country is concerned" (*id.* at 330) the decrees of the Soviet Government nationalizing all property, wherever located, of Rus-

The first five subdivisions of Rule 113 of the Rules of Civil Practice do not apply to equitable actions. *Albertson v. Fidelity & Deposit Co.*, 253 App. Div. 801; *103 Park Avenue Co. v. Exchange Buffet Corp.*, 203 App. Div. 739; *Fiscella v. Fridman*, 169 Misc. 327; *Anderson v. Title Guarantee & Trust Co.*, 248 App. Div. 895; *Tracy v. Danzinger*, 249 App. Div. 46; *Newark Fire Ins. Co. v. Brill*, 251 App. Div. 399. Subdivisions 6, 7, and 8 of the Rule are patently inapplicable upon their face. The only provision of Rule 113 which might have been applicable is that contained in the fifth paragraph, authorizing summary judgment "where the defense is founded upon facts established prima facie by documentary evidence or official record." This contemplates a case where the document or official record is in itself proof of the defense asserted. See, e. g., *Lederer v. Wise Shoe Co.*, 276 N. Y. 452; *Wels v. Rubin*, 254 App. Div. 484. Here the "fact" involved was the intention of the Russian decrees as a matter of Russian law. The circumstance that evidence on this question was introduced in the *Moscow* case does not make that mass of testimony an "official record" of the kind contemplated. Moreover, the elementary requirement that a party attach to his papers copies of all documents relied on (*Neff v. Palmer*, 131 Misc. 671; *Pross v. Foundation Properties, Inc.*, 158 Misc. 304, 307; *Wels v. Rubin*, *supra*) was not complied with, nor were any specific documents referred to.

sian corporate nationals, including a bank deposit in the United States; that "no state policy can prevail against the international compact here involved" (*id.* at 327); and that "state constitutions, state laws, and state policies are irrelevant * * *" (*id.* at 332). The court below, in plain disregard of the decision in the *Belmont* case, has held that the validity of the title acquired by the United States under the Litvinov Assignment is governed exclusively by state law.

2. The decision below is not based on any independent and adequate non-federal ground. The material allegations of fact were admitted by the motion. And the decision that the local branch of the First Russian Insurance Company is a "complete and separate organization", the assets of which cannot be reached by the domiciliary state of the parent corporation, necessarily presents a federal question. The status of the local branch can be material only for the purpose of determining whether the surplus assets belonged to a domestic corporation beyond the jurisdiction of the Soviet Government at the time of the nationalization decrees. The court below, however, did not hold that the assets belonged to the New York branch; it expressly recognized, in accordance with its own prior decisions,⁴ that at the time of the nationalization

⁴ *Matter of People (Second Russian Ins. Co.)*, 256 N. Y. 177, 181; *Matter of People (Moscow Fire Ins. Co.)*, 255 N. Y. 433; *Matter of People (Russian Reinsurance Co.)*, 255 N. Y. 415; *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248;

decrees the surplus assets belonged to the parent corporation domiciled in Russia. The *Belmont* case squarely holds that state law is irrelevant to the validity of the nationalization of the property of such Russian corporate nationals, even though the property is located within the state, and further holds that as a matter of federal law, the nationalization is valid. It is immaterial that in this case the Russian corporation engaged in business in New York through the New York branch. The state may enforce the conditions prescribed for the conduct of the corporation's domestic business, but it did not acquire authority nor did it prior to the *Moscow* decision attempt to prescribe the rule of law by which the validity of the title to the surplus assets should be determined after the conditions had been satisfied. At all events the question whether the *Belmont* decision precludes the application of state law in these circumstances is one which can authoritatively be determined only by this Court.⁵

Jamès & Co. v. Russia Ins. Co., 247 N. Y. 262; *Matter of People (Norske Lloyd Ins. Co.)*, 242 N. Y. 148; *Matter of People (City Equitable Fire Ins. Co.)*; 238 N. Y. 147.

⁵ In the event the petition is granted the Government will also argue that there is no fair and substantial basis in state law, independently determined, for the ruling below that the local branch is a separate and independent organization (cf. *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113, 119; *Lawrence v. State Tax Comm.*, 283 U. S. 276, 283; *Broad River Co. v. South Carolina*, 281 U. S. 537, 540; *Ancient Egyptian Order v. Michaux*, 279 U. S. 737, 744-745; *Davis v. Wechsler*, 263 U. S. 22, 24; *Ward v. Love County*, 253

3. Practically the same substantial questions here involved were first presented to this Court by the Government's petition for certiorari in *United States v. Bank of New York & Trust Co.*, 296 U. S. 463. This Court stated in its opinion that certiorari had been granted "Because of the nature and importance of the questions presented" (296 U. S. at p. 471); and in remitting the Government to the state court for adjudication of its title, carefully pointed out that any federal question presented in the state court might be reviewed by this Court for final decision.* The Government's petition was again granted in the *Moscow* case (308 U. S. 542), where this Court affirmed, by an equally divided Court of six Justices.

U. S. 17, 22; *Norris v. Alabama*, 294 U. S. 587, 589, 590; *Cresswell v. Knights of Pythias*, 225 U. S. 246, 261), and further, that the state law should be independently determined by this Court, the denial of the title of the United States by a state court necessarily involving a federal question which may be reviewed by this Court. *Mason Co. v. Tax Comm'n.*, 302 U. S. 186, 197; *United States v. Ansonia Brass & C. Co.*, 218 U. S. 452; *Stanley v. Schwalby*, 162 U. S. 255, 278-279; *United States v. Perkins*, 163 U. S. 625; *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, 22.

* The Court stated in its opinion (296 U. S. 479):

In this instance it cannot be doubted that the United States is free to invoke the jurisdiction of the state court for the determination of its claim, and the decision of the state court of any federal question which may be presented upon such an invocation, may be reviewed by this Court and thus all the questions which the Government seeks to raise in these suits may be appropriately and finally decided. Jud. Code, § 237, 28 U. S. C. 344.

Confusion has resulted and in spite of years of litigation the Government's rights under the Litvinov Assignment have not been definitely determined. Cf. *Hines v. Davidowitz*, No. 22, this Term, decided January 20, 1941, n. 19. In *United States v. Manhattan Co.*, 276 N. Y. 396, the court below held that a complaint substantially identical to that involved in the present case stated a good cause of action and remitted the case to the lower New York courts for further proceedings.⁷ Such proceedings have been held in abeyance because of the subsequent litigation in the *Moscow* case and in this action. Similar uncertainty exists with respect to the Government's claims involving assets of other Russian companies in other courts.⁸

The majority and concurring opinions of this Court in the *Belmont* case, the majority and dissenting opinions of the court below in the *Moscow* case, and the equal division of this Court in that case, indicate a contrariety of judicial views which appropriately should be finally settled by this Court.

⁷ In *Bettman v. Northern Ins. Co.*, 134 Ohio St. 341, the Supreme Court of Ohio followed the decision of this Court in the *Belmont* case and that of the Court of Appeals of New York in *United States v. Manhattan Co.*, *supra*, to reach a result in substantial conflict with the decision of the Court of Appeals in this case.

⁸ There are about 15 cases pending in various state and federal courts involving the claim of the United States to the property in this country of nationalized Russian Corporations.

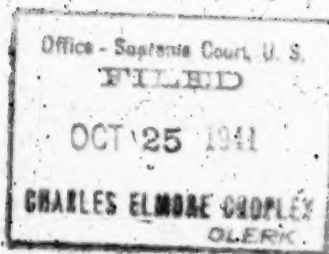
CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MARCH, 1941.

FILE COPY



No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF
THE STATE OF NEW YORK, AND AS LIQUIDATOR OF
THE DOMESTICATED UNITED STATES BRANCH
OF THE FIRST RUSSIAN INSURANCE COMPANY,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW YORK, NEW YORK COUNTY

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 42

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF
THE STATE OF NEW YORK, AND AS LIQUIDATOR OF
THE DOMESTICATED UNITED STATES BRANCH
OF THE FIRST RUSSIAN INSURANCE COMPANY,
ESTABLISHED IN 1827; VICTOR YERMALOFF; AND
OTHERS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the Supreme Court of New York, New York County (R. 52), is not reported. Judgment of affirmance by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department (R. 57) was entered without opinion. The *per curiam* opinion of the New York Court of Appeals (R. 71-72) is reported in 284 N. Y. 555. The opinion of the New York Court of Appeals in *Moscow Fire Ins. Co. v. Bank of New York*,

which was the basis of the decision below in this case, is reported in 280 N. Y. 286. For the convenience of the Court, the *Moscow* opinion is reprinted in Appendix A, *infra*, pp. 86-123.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1940 (R. 65-66); the judgment of the Supreme Court, New York County, on remittitur from the Court of Appeals, was entered on January 7, 1941 (R. 67-68). The petition for a writ of certiorari was filed on March 29, 1941, and granted on May 5, 1941 (R. 73). The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The First Russian Insurance Company, which had established a branch in the State of New York, was dissolved by decrees of the Soviet Government in 1918 and its assets were nationalized. The effect of these decrees under Russian law was to transfer to the Soviet Government all rights of the Insurance Company in the assets of the New York branch. In 1933, these rights were transferred by the Soviet Government to the United States by the Litvinov Assignment. Previously, however, the New York assets, under orders of the New York courts, had been taken over by the New

York Superintendent of Insurance, who had paid all claims of domestic creditors. In the present action, brought by the United States against the Superintendent of Insurance and all foreign claimants of the assets, the United States seeks to establish that it has the same rights in the assets, remaining after the payment of all valid and enforceable claims, as the First Russian Insurance Company would have had, under New York law, had it not been dissolved. The principal questions involved are:

(1) Whether, after the United States granted recognition to the Soviet Government and accepted the Litvinov Assignment, the state courts had power to deny effect to the Soviet nationalization decrees upon grounds of a local public policy against confiscation.

(2) If not, whether there is any independent ground of state law upon which the state court refused to recognize the claim of the United States.

(3) Whether the contention that the Soviet decrees were not intended to cover the particular assets in controversy is available to respondent in this proceeding.

INTERNATIONAL COMPACT AND STATUTES INVOLVED

The Litvinov Assignment and the relevant New York statutes are set forth in Appendices B and C, pp. 124-142.

STATEMENT

The United States brought the instant action against the respondent,¹ the Superintendent of Insurance of New York, to recover the assets of the New York branch of the First Russian Insurance Company, which remained after the payment of the claims of all domestic creditors. The complaint alleged that such assets had by Russian law passed to the Government of Russia and had been assigned to the United States by that Government (R. 23-24). On motion of the respondent, the complaint was dismissed for failure to state a cause of action (R. 5-7).

The pleadings. The material facts set forth in the complaint may be summarized as follows: The First Russian Insurance Company, a corporation organized under the laws of the former Empire of Russia (R. 19), established a United States branch in the State of New York in 1907 (R. 22). In compliance with the laws of that state the company deposited with the Superintendent of Insurance of New York certain assets to secure the payment of all claims resulting from the transactions of the New York

¹ The foreign policyholders and creditors of the First Russian Insurance Company asserting rights in and to the surplus assets of the company were named as defendants in the complaint, but did not join in the Superintendent's motion to dismiss and for summary judgment. Their rights are involved on this appeal only to the extent that the Superintendent of Insurance represents them.

branch. In 1918 the Russian Government by various laws, decrees, enactments, and orders, made the business of insurance in all of its forms a state monopoly, dissolved all insurance companies, and cancelled the debts of such companies and the rights of the stockholders to any claims therein (R. 23). These laws and decrees also nationalized all of the assets and property of Russian insurance companies wherever situated (R. 23-24).

The New York branch of the First Russian Insurance Company continued to do business in New York until 1925. At that time the respondent took possession of its assets, pursuant to an order of the Supreme Court of New York, which directed him to determine and report upon the claims of the policyholders and creditors of the company in the United States (R. 25-26). Thereafter, all claims arising out of the business of the United States branch of the company (referred to herein as the claims of domestic creditors) were fully paid by respondent (R. 26-27) and there remained in his hands approximately \$1,335,653.73 (R. 27). In determining the disposition that should be made of this surplus, the New York Court of Appeals, on February 10, 1931, directed that the respondent proceed to determine and pay the claims, first, of the foreign creditors who had filed attachments prior to the commencement of the liquidation proceeding in 1925 and, second, of

those foreign creditors who had filed claims with him prior to the entry of the order on the remittitur of the Court of Appeals. The respondent was then directed to pay any surplus to a quorum of the directors of the company (R. 28-29). See 255 N. Y. 415, 423. The respondent thereupon proceeded with the liquidation of the claims of those foreign creditors. From time to time certain claims have been allowed, and certain payments have been made thereon (R. 29-32). The major portion of the allowed claims have not been paid, their payment being stayed pending the disposition of the claim of the United States (R. 34).

On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the *de jure* Government of Russia and in the course of and as an incident to that recognition accepted an assignment from the U. S. S. R. of all claims which it had against nationals of the United States. This is known as the Litvinov Assignment (R. 31).

On November 14, 1934, while the liquidation proceedings were pending, the United States commenced a suit against respondent in the District Court of the United States for the Southern District of New York, seeking to recover the assets still remaining in the hands of the respondent. On writ of certiorari this Court concluded that since the *res* was in the custody of a state court, the federal courts lacked jurisdiction to dispose of

the controversy and remitted the United States to the state courts for the determination of its claim (R. 32-33). *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 475.

The United States then moved for leave to intervene in the liquidation proceedings being conducted by the respondent. The motion was denied on March 14, 1936, "without prejudice to the institution of the time-honored form of action" (R. 33-34). That order was affirmed by the Appellate Division without opinion on June 30, 1936, and the Appellate Division and the Court of Appeals denied motions of the United States for leave to appeal to the Court of Appeals (R. 34). Thereafter, the present suit was instituted in the Supreme Court of New York. The complaint prayed that the respondent be enjoined from distributing the surplus, that the liquidation proceedings be stayed until the determination of the claim of the United States, and that the court vacate all awards to other than domestic creditors and order distribution of the entire surplus to the United States (R. 36).

Respondent answered admitting the material allegations concerning the Insurance Company, but denying the claim of the United States (R. 37-38). Six affirmative defenses were also pleaded (R. 38-49) including two separate defenses that the Soviet decrees relied upon by the United States were not intended to apply to property outside the territory of the U. S. S. R. and not taken into its actual custody (R. 46-47).

Following the decision of the New York Court of Appeals in *Moscow Fire Insurance Co. v. Bank of New York*, 280 N. Y. 286, affirmed by an equally divided court, 309 U. S. 624, rehearing denied, 309 U. S. 697, deciding, after a full trial, many of the same questions as are presented by the pleadings here, respondent moved, pursuant to Rule 113 of the New York Rules of Civil Practice and Section 476 of the New York Civil Practice Act, to dismiss the complaint and for summary judgment in his favor, on the ground that there was no merit to the action and that it was insufficient in law (R. 10). The affidavit in support of the motion stated that "There is no dispute as to the facts," and that the affirmative "defenses need not now be considered for the complaint standing alone is insufficient in law and must be dismissed" (R. 13).

The action of the courts below. The Supreme Court, New York County, dismissed the complaint on the authority of the *Moscow* case and entered summary judgment for respondent (R. 8-9). The Appellate Division, on May 17, 1940, affirmed without opinion (R. 57-58). On appeal pursuant to leave granted by the Appellate Division (R. 61-62) the Court of Appeals affirmed (R. 71-72).

The Court of Appeals rendered a *per curiam* opinion stating only that the "judgment appealed from is in accord with the decision of this Court in *Moscow Fire Ins. Co. v. Bank of New York*" and that it would "apply in this case the same

rules of law which the court applied in the earlier case. * * *." (R. 71-72). Accordingly, save as otherwise expressly noted, reference in the Argument to the opinion of the Court of Appeals will be to the opinion of the court in the *Moscow* case rather than to the *per curiam* opinion in this case.

The claim of the United States. Although, as stated above, the complaint prays that all assets remaining in the hands of the respondent after the payment of domestic creditors be turned over to the United States, the only relief presently sought is that the United States be recognized as the successor to the title and interest of the First Russian Insurance Company. Should this claim of the United States to be the successor of the Insurance Company be established, the further questions whether the New York courts may undertake distribution of the assets to foreign claimants and, if so, whether those claims are valid, will have to be determined in subsequent proceedings. The Court of Appeals held that the United States' claim of succession, considered on its own merits, was invalid, and that the United States could not, therefore, contest the distribution to other claimants even though it might subsequently be determined that all such claims were invalid and that the surplus funds were consequently *res nullius*. The correctness of that decision is the only question presented to this Court for review.

The interest of foreign claimants. A decision of this Court establishing that the New York courts must recognize the United States as successor to the Insurance Company will not of itself affect the rights of foreign claimants, including both creditors and stockholders, since, as we have stated, further proceedings will be necessary to determine whether the New York courts may distribute the assets and, if so, whether the foreign claims are valid. The principal interest of the foreign claimants in the present controversy, therefore, is the practical consideration that, if the United States' right of succession is recognized and its standing to contest the foreign claims is thus established, it may subsequently appear that New York may not lawfully undertake distribution or that the foreign claims are invalid and, therefore, that the foreign claimants are not legally entitled to any distribution. The foreign claimants, and particularly the stockholders, have the further interest that the rationale of decision, if favorable to the Government, may also support the invalidity of the foreign claims.²

² Since the case is here on the pleadings, it is impossible to do more than indicate certain classes of claims which may be held baseless. The rights of creditors and stockholders dependent on transactions in Russia may have been validly destroyed by the nationalization decrees, or the creditors' ruble claims may be valueless. *Dougherty v. Equitable Life Assurance Society*, 266 N. Y. 71; *Dougherty v. National City Bank*, 157 Misc. 849 (Sup. Ct.). The claims of non-Russian

The interest of the State of New York. Since all domestic creditors have been paid and the question of distribution to foreign creditors and stockholders is not involved, the State of New York has no interest whatever apart from the physical presence of the assets within the state.³

creditors may be governed by the law of a country which recognizes the applicability of the decrees (e. g. Article 2 of the Treaty of Rapallo, April 16, 1922, between Germany and Soviet Russia). The non-Russian foreign claims also raise the question whether New York should remit them to the assets of the Insurance Company available at their domiciles, or in the countries where they did business with the company. *United States v. Manhattan Co.*, 276 N. Y. 396, 407. It may also be held that the rights of all claimants were validly abolished by the governing law of the state of incorporation. *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527. Finally, creditors' claims may be held unsound for various individual factual and legal reasons.

³ If the United States is not recognized as successor to the title or interest of the Insurance Company, the surplus remaining after the payment of any enforceable claims of creditors would in principle go to the State of New York by way of escheat, although so far no such claim has been asserted by or on behalf of the State. Rather, the entire surplus after payment of foreign creditors has hitherto been distributed to stockholders, as in the *Moscow* case. Cf. *Moscow Fire Ins. Co. v. Hakscher & Gottlieb*, 260 App. Div. 646, 647, 23 N. Y. Supp. (2d) 424, 427 (1st Dept.), affirmed 285 N. Y. 428. In the *Moscow* case, however, no contention was made as to the validity of the stockholders' claims. Under the rule in *Dougherty v. Equitable Life Assur. Society*, 266 N. Y. 71, claims of stockholders would seem to be invalid even in New York since founded on agreements made and to be performed in Russia and therefore validly cancelled by the Russian nationalization decrees.

SPECIFICATION OF ERRORS TO BE URGED

The New York Court of Appeals erred:

1. In holding that the residual right to the surplus funds of the local branch, which the court held belonged to the "parent" Russian insurance corporation, did not pass under the Soviet nationalization decrees because of a state policy against confiscation.

2. In holding that the Soviet law, which the court held normally determines the successor to the rights of a Russian insurance corporation under the New York law of conflicts, was unenforceable because of a state policy against confiscation.

3. In holding that, because the local branch, prior to its dissolution, had been a separate legal entity and had held the funds as its assets under state control and regulation, the courts of New York were free to pass judgment on the Soviet nationalization decrees.

4. In holding that the Litvinov assignment does not preclude the states from refusing to enforce the Soviet decrees on grounds of a local policy against confiscation.

5. In failing to hold that, by recognizing the Soviet Government and executing the Litvinov Assignment, the Executive Department of the Federal Government established as the policy of this nation that, in order to permit the settlement of all question outstanding between the two governments, no objection should be asserted to the

confiscation of the property of Soviet nationals wherever located.

6. In failing to hold that the policy of the State of New York is in direct conflict with the Federal policy and is therefore invalid.

7. In failing to hold that, even in the silence of the Federal Government, the State of New York may not refuse to apply the Soviet nationalization decrees to the property involved because of a local public policy against confiscation.

8. In holding that the local branch of the First Russian Insurance Company had existed as a separate and distinct corporate entity and that the funds deposited by the Insurance Company had been the assets of its New York branch.

9. In affirming the judgment dismissing the complaint.

SUMMARY OF ARGUMENT

I

The complaint alleges and the motion admits that the Soviet nationalization decrees were intended to apply to the assets of the First Russian Insurance Company in New York. The question is whether the decrees, if so intended, shall be given that effect in the courts of New York.

The court below recognized that the Insurance Company, but for its dissolution, would have had a "residual right" to the surplus funds, and further, that under the normal New York law of conflicts, the succession to that residual right would

be governed by Russian law. It refused to give effect to the Soviet nationalization decrees, however, because of a state policy against confiscation. This decision is in direct conflict with the decision in *United States v. Belmont*, 301 U. S. 324, and, considered as an original matter, is untenable.

A. In the *Belmont* case, this Court held that the recognition of the Soviet Government and the acceptance of the Litvinov Assignment validated the nationalization decrees so far as this country was concerned, and that when the aid of the courts is invoked in consummation of the Assignment, a state policy against confiscation is irrelevant. The *Belmont* case is directly in point and cannot be successfully distinguished. Here, as there, the United States claims as successor to the admitted rights of a foreign corporation.

The authority of the *Belmont* case has not been limited by the subsequent decision in *Guaranty Trust Co. v. United States*, 304 U. S. 126. In that case this Court held that a foreign government was not entitled to immunity from local statutes of limitations, and that the Litvinov Assignment was not intended to remove the bar of such statutes. On the assumption that a foreign government has no immunity, the defect in the claim was one which would have existed regardless of its ownership or nationalization. Such questions are not ordinarily dealt with by the Executive Department of the Federal Government and it may be assumed that, in general, there was no intention to do so in the case

of the Litvinov Assignment. In this case, on the other hand, the question is whether enforcement may be denied to an otherwise valid claim on the sole ground that the Soviet nationalization decrees are abhorrent to the moral principles of the forum. This question is one which was dealt with in the Litvinov Assignment. Under the Assignment, and even in the silence of the Federal Government, the states are without power to deny effect to the Soviet decrees because of a local policy against confiscation.

B. The recognition and Assignment embody a federal policy that, in the interest of friendly relations, no objection should be asserted to the Soviet nationalization of the claims of Russian nationals to any property located in the United States. And this policy necessarily implies an intention to preclude the states from asserting any such objection.

That the Federal Government has no policy against the Soviet nationalization of such property is not controverted. The acceptance of the Assignment reflects the deliberate determination of the Executive Department that the enforcement of such a policy would be contrary to the interest of the United States. For more than fifteen years this Government had withheld recognition of the Soviet regime because, among other reasons, of its objection to the fundamental principles of the Soviet nationalization decrees. The purpose of the President in reversing this position was to remove all questions outstanding

between the two governments in order to permit the establishment of friendly relations. As the enforcement of a state policy against confiscation would restore the obstacle to friendly relations which the President sought to remove, the executive action must be construed to imply an intention to preclude the enforcement of such state policy.

The validity of the federal policy is clear. The President's power to grant or withhold recognition includes the power to determine the underlying policy. The executive power in respect of recognition also includes authority to prescribe the conditions of recognition. Since disagreement over the method of settlement of American claims against the Soviet Government had been one of the principal obstacles to the establishment of friendly relations, the President could agree to the use of the nationalized property of Soviet nationals as a method of settling the American claims and, to that end, determine that no domestic policy against confiscation should bar this method of settlement. Moreover, apart from its relation to recognition, the Litvinov Assignment and the federal policy embodied therein are a valid exercise of the power of the President to enter into international agreements without the consent of the Senate. Agreements for the settlement of American claims against foreign governments are among the most familiar examples of such compacts.

Since the executive policy is valid it is entitled to supremacy over the contrary state policy. The theory of the Constitution is that every valid act of any branch of the Federal Government is a "law of the United States" within the meaning of the Supremacy Clause.

C. Even in the silence of the Federal Government, the states are without power to deny effect to foreign decrees on grounds of a state public policy against confiscation. This Court has so held where property which has been confiscated by a foreign sovereign in its own territory is brought within the custody of a local court. *Oetjen v. Central Leather Co.*, 246 U. S. 297. The doctrine rests on the broad ground that for the courts of one country to pass judgment on the acts of another sovereign would vex the peace of nations. There is no reason for a different conclusion where the foreign sovereign attempts to nationalize property of its nationals which has always had its situs here. The denial of effect to the foreign decrees is of as much concern to the foreign sovereign in the one case as in the other and the refusal to enforce the decrees because of opposition to the fundamental principles of the decrees is apt to be regarded by the foreign sovereign as a hostile act in either case.

II

The decision below cannot be rested on the independent ground of local law that the New York

branch had been a juristic entity separate and distinct from the Insurance Company. Analysis of the opinion of the Court of Appeals demonstrates that, despite the discussion of the separate entity theory, the basis of the decision was intended to be and must have been the view that the Soviet decrees, because of their confiscatory character, are contrary to the public policy of New York. No other interpretation adequately explains the conclusion reached. And under any other construction of the opinion, the decision would be so palpably without basis in New York law as to require invocation of the rule that, where a federal right is asserted, neither plainly untenable non-federal grounds nor any cloak or pretext to evade the federal claim can preclude this Court from deciding the federal question.

III

The complaint alleges that the effect of the Soviet decrees, as a matter of Russian law, was to nationalize the assets of the First Russian Insurance Company, wherever situated, including the company's residual right in the assets of its New York branch. Respondent raised no issue with respect to this allegation and the court below decided none. The decision, therefore, cannot be rested on the ground that the Soviet decrees were not intended to reach the assets here in controversy.

ARGUMENT

The position of the United States in this litigation is essentially simple. The Soviet Government by its nationalization decrees took over whatever rights the Insurance Company had in the assets of its New York branch. These rights the Soviet Government transferred to the United States by the Litvinov Assignment. In this litigation, the United States seeks to establish only that, by virtue of the nationalization decrees and the Litvinov Assignment, it has succeeded to such title and interest in the New York assets as the Insurance Company would have had under New York law had it not been dissolved.

The opinion of the court below denying this claim of the United States is quite confused in its reasoning. This much is entirely clear, however: The Court of Appeals recognized, *first*, that if the Insurance Company had continued to exist, the New York assets remaining after the payment of domestic creditors would have been transmitted to the company at its domicile; and *second*, that if the company had been in liquidation, the assets would have been transmitted to the domiciliary liquidator or administrator. 280 N. Y. at 299, 310. In other words, no question was raised by the Court of Appeals either as to the title of the Insurance Company to the assets or as to the proposition that ordinarily under the New York law of conflicts the person entitled as successor to the assets of a foreign insurance company under the law of its domi-

cile is entitled to be recognized as successor to any title or interest of the company in assets located in New York. Further, the Court of Appeals did not question that the Litvinov Assignment transferred to the United States whatever rights the Soviet Government then had to the assets.

The basis of the decision below must have been, therefore, that, under the public policy of the State of New York, the New York courts will not give effect to any transfer of rights under the Soviet nationalization decrees because of their confiscatory character. While the court disavowed any intention of applying the local public policy to property "situated elsewhere", it refused effect to the Soviet decrees upon the express ground that "confiscatory" decrees "do not affect the property claimed here" (280 N. Y. at 314). Analysis of the opinion of the court, undertaken later in this brief (pp. 57-63), confirms this conclusion.⁴

⁴ The court below also held that the local branch, prior to the time that it was liquidated and "ceased to exist" (280 N. Y. at 310), had been a separate legal entity (*id.* at 308, 311), and that the funds deposited in New York had been "its assets" (*id.*, 313). As we show below, however, this conclusion is not inconsistent with the court's express recognition of the "residual right" (*id.*, 314) of the "parent" Russian corporation and of the normal New York rule of conflicts that the successor to a foreign corporation is determined by the law of its domicile (*id.*, 299, 310). The discussion of the separate entity theory was merely intended to establish that, although the Soviet law might be applicable under the normal New York rules of conflicts, the local courts were not precluded by the doctrine of *Oetjen v. Central Leather Co.*, 246 U. S. 297, from passing judgment on the Soviet law in the circumstances of this case (see pp. 60-61, 68, *infra*).

The principal question in the case, therefore, is whether, after the United States had recognized the Soviet Government and had accepted the Litvinov Assignment, the states were precluded as a matter of constitutional law from denying effect to the Soviet nationalization decrees upon grounds of a local public policy against confiscation. This Court answered that question in the affirmative in *United States v. Belmont*, 301 U. S. 324, a case on all fours with the present one. Our principal argument, therefore, will be devoted to establishing that the *Belmont* case was correctly decided and that its authority is in no way impaired by the subsequent decision in *Guaranty Trust Co. v. United States*, 304 U. S. 126.

One further preliminary observation is necessary. A large part of the *Moscow* opinion is devoted to the question whether there was support in the record for the finding of fact by the referee in that case that, as a matter of Russian law, the Soviet nationalization decrees were not intended to cover the assets of a New York branch of a Russian insurance company. That question, as we point out in some detail below (pp. 78-84), is not presented in this case, since the complaint here alleges as a fact that the Soviet decrees were intended to cover the assets in controversy (R. 23-24), and no issue with respect to this allegation was raised by respondent's motion for summary judgment or decided by the court below.

THE STATE COURTS ARE WITHOUT POWER UNDER THE
FEDERAL CONSTITUTION TO DENY EFFECT TO THE SOVIET
NATIONALIZATION DECREES UPON GROUNDS OF A STATE
POLICY AGAINST CONFISCATION

A. THE DECISION OF THIS COURT IN UNITED STATES V. BELMONT,
301 U. S. 324, IS CONCLUSIVE

In *United States v. Belmont*, 301 U. S. 324, the United States sued as assignee of the Soviet Government to recover a sum of money deposited by a Russian corporation with the defendant bank. The complaint alleged that the Soviet Government had dissolved the corporation and nationalized its asset, wherever located, that the bank deposit thereby became the property of the Soviet Government and that it was assigned to the United States under the Litvinov Assignment of November 16, 1933. The Circuit Court of Appeals for the Second Circuit held that a motion to dismiss should be granted, upon the ground that the debt had acquired a situs in New York and that to give effect to the Soviet decrees as applied to such assets would be contrary to the public policy of New York. 85-F. (2d) 542. This Court reversed. It held that the effect of the recognition of the Soviet Government and of the Litvinov Assignment was "to validate, so far as this country is concerned" the decrees of the Soviet Government nationalizing all property of Russian corporate nationals, including the bank deposit in the United States (301 U. S. at 330); that "no state policy can prevail against the interna-

tional compact here involved" (*id.*, 327); and that "state constitutions, state laws, and state policies are irrelevant * * *". *Id.*, 332. In reaching this conclusion, the Court invoked the doctrine, announced in *Underhill v. Hernandez*, 168 U. S. 250, and *Oetjen v. Central Leather Co.*, 246 U. S. 297, that every sovereign state must recognize the independence of every other sovereign state and may not, therefore, sit in judgment on the acts of another government, done within its own territory. The Court referred with approval to the decision of the English Court of Appeal in *A. M. Luther v. James Sagor & Co.*, [1921] 3 K. B. 532, holding that the question whether the nationalization decrees of a recognized government should be refused recognition because opposed to public policy and moral principle was one for the determination of the sovereign acting through his ministers.

The *Belmont* case cannot be successfully distinguished. The fact that it was decided on a motion to dismiss provides no basis for distinction, since the same is true here, nor does it serve to obscure the import of the decision. The motion to dismiss may have been taken to admit that the Soviet decrees were intended to reach assets located abroad insofar as questions of foreign law are treated as issues of fact. But obviously it did not admit the legal conclusion that the decrees, so construed, must be given effect in New York or that the Soviet Government acquired by nationalization a title which the law of New York

was bound to recognize, and neither the Circuit Court of Appeals nor this Court attributed any such admission to the motion. Nor is the difference in the nature of the assets involved material in any way. The holding of the Circuit Court of Appeals that the debt in the *Belmont* case, although an intangible, had acquired a situs in New York was supported by ample precedents, as the cases cited in the court's opinion disclose. See 85 F. (2d) at 543-544. This ruling was adverted to in the opinion of this Court (301 U. S. at 327) but the Court apparently concluded that the situs of the property was irrelevant. Finally, it is immaterial that "legal" title to the surplus funds here involved was always vested in a local trustee and that the assets may have been those of a separate New York "juristic personality" prior to its dissolution. 280 N. Y. at 309. The question presented is whether the Soviet Government succeeded to whatever residual right the Russian corporation possessed. And on this question even the minority in the *Belmont* case apparently recognized that New York was bound to recognize the Soviet Government "as the successor of its national", although they were of the view that New York was free to subordinate this interest to that of other claimants. 301 U. S. at 335.

The authority of the *Belmont* case is not limited by the subsequent decision of this Court in *Guaranty Trust Co. v. United States*, 304 U. S. 126. In that case, this Court held that sovereign im-

munity from local statutes of limitation does not extend to foreign sovereigns, that a claim acquired by the United States after the running of the statute of limitations is subject to the statutory bar in the hands of the United States, and that the Litvinov Assignment was not intended to enlarge the rights of the United States, but merely to empower it to collect the claims "in conformity to local law," 304 U. S. at 143. In other words, apart from the holding with respect to sovereign immunity, an issue not here involved, the decision was merely that defenses to the merits of an assigned claim which would be available under local law regardless of the ownership of the claim were not intended to be barred by the Litvinov Assignment. The question in this case, as in the *Belmont* case, is the wholly different one of whether the states have power to deny enforcement of a *valid* claim simply because the nationalization decrees under which ownership of such claim was transferred from the Insurance Company to the Soviet Government are considered contrary to the moral principles of the forum. This question, as we show below (pp. 26-35), and as this Court held in the *Belmont* case, is one that is dealt with in the Litvinov Assignment by necessary implication. That the court did not consider the rule of the *Belmont* case to be even remotely involved in the *Guaranty* case is evident from the fact that it nowhere undertook to distinguish the prior decision.

Although we believe that the *Belmont* case is decisive of the present one and that its authority has not been impaired by any subsequent decision of this Court, the adverse decision of the court below compels us to argue further that, considered as an original question, the *Belmont* case was correctly decided.

B. THE NEW YORK POLICY IS IN CONFLICT WITH THAT OF THE EXECUTIVE DEPARTMENT OF THE FEDERAL GOVERNMENT AND IS THEREFORE INVALID

The Executive Department of the Federal Government, in recognizing the Soviet Government and accepting the Litvinov Assignment, has established as the policy of the nation that, in order to settle all questions outstanding between the two governments and particularly in order to provide a method for the settlement of American claims against the Soviet Government, no objection should be asserted to the Soviet nationalization of the property of Russian nationals, wherever situated. This executive policy, which the Executive Department had constitutional power to adopt, is in conflict with the local policy announced below and under the Supremacy Clause, or even apart from that clause, the state policy must yield.

The conflict between the executive policy and that of the State of New York. For more than fifteen years the United States withheld recognition from the Soviet regime because of the fundamental Soviet policy of nationalization and the failure to

reach an agreement for the settlement of mutual claims and counterclaims incident to the Soviet revolution. In 1933, however, President Roosevelt, in order "to end the present abnormal relations between the hundred and twenty-five million people of the United States and the hundred and sixty million people of Russia" invited President Kalinin to designate representatives to explore "all questions outstanding between our countries." See Official Document of the State Department, Eastern European Series No. 1, 1933, p. 1.

Thereafter, on November 16, 1933, the Government of the United States accorded diplomatic recognition to the Soviet Government. As part of the recognition proceedings, the Soviet Government, in an exchange of correspondence between its representative, Maxim Litvinov, People's Commissar for Foreign Affairs, and the President of the United States, made a written assignment to the United States of all claims against American nationals, either due or found to be due, "preparatory to a final settlement of claims and counterclaims" between the two governments and their respective nationals. The Soviet Government agreed not to pursue existing litigation nor initiate new suits to recover amounts "admitted to be due or that may be found to be due it" from American nationals, and assigned all such amounts to the United States. In return, the Soviet Government asked and received assurance from the

United States² that it would be duly notified in each case of any amount realized by the United States from the release and assignment.

On the same day, President Roosevelt and Mr. Litvinov issued a joint statement to the following effect:

In addition to the agreements which we have signed today, there has taken place an exchange of views with regard to methods of settling all outstanding questions of indebtedness and claims that permit us to hope for a speedy and satisfactory solution of these questions which both our Governments desire to have out of the way as soon as possible.

And, in a letter to Mr. Litvinov dated November 23, 1933, President Roosevelt declared:

I am profoundly gratified that our conversations should have resulted in the restoration of normal relations between our peoples and I trust that these relations will grow closer and more intimate with each passing year. The cooperation of our governments in the great work of preserving peace should be the corner stone of an enduring friendship.

Several facts concerning the recognition and Assignment should be noted. The parties intended the Assignment to cover all nationalized claims of Russian nationals to assets located in the United States. See *United States v. Belmont*, 301 U. S. 324; 327. Any ambiguity that might have existed in the language of the original instrument was

subsequently removed by the letters exchanged between Commissar Litvinov and the American Charge d'Affaires on January 7, 1937, printed in Appendix D, *infra*. The amounts recovered on these claims, as the express language of the communications reveals, were intended to be used in satisfaction of claims of the United States against the Soviet Government arising out of alleged injuries to the United States and its nationals. Cf. Sack, *Diplomatic Claims against the Soviets* (1918-1938) II, (1939) 16 N. Y. U. L. Q. Rev. 253, 262-264, 277-279.⁵ And the avowed purpose of the President in entering into this agreement was to settle "all questions outstanding" between the two countries "in order to end the abnormal relations" between the "people of the United States and of Russia" and thus to promote "the cooperation of our governments in the great work of preserving peace * * *."

It is clear from these facts that the Executive Department of the Federal Government has no

⁵ The United States has adopted the policy of holding all amounts realized under the Assignment for the benefit, in whole or in part, of American private claimants against Russia. See the Letter of the Department of State, quoted in Appendix F, *infra*, p. 149. The Joint Resolution of August 4, 1939, 53 Stat. 1199, provides for the appointment of a Commission to determine the claims of American nationals against the Soviet Government. The committee reports set forth a letter from the Secretary of State referring to past and prospective recoveries under the Assignment as one of the reasons for the creation of the Commission. S. Rep. No. 767, 76th Cong., 1st Sess.; H. Rep. No. 805, 76th Cong., 1st Sess.

policy against the Soviet nationalization of the property of its nationals located in the United States. The respondent does not and cannot contend the contrary; manifestly, the President could not have accepted the assignment of nationalized claims to property in the United States while reserving an objection on the part of the United States to the policy of nationalization. The sole question is whether the absence of any such objection reflects the mere silence of the Federal Government on this question or, on the other hand, its affirmative determination that the assertion of such an objection would be contrary to the best interests of the United States. Cf. *Hines v. Davidowitz*, 312 U. S. 52, 71. If the latter, then, as we show below, an intention to preclude the states from asserting such an objection must be implied. *Hines v. Davidowitz*, *supra*, at 67-68, 71-72, 74.

The President, we submit, determined that the assertion of such an objection would be prejudicial to the interests of the United States. For more than fifteen years the Executive Department had withheld recognition because, among other reasons, of its objection to the fundamental nationalization policy of the Soviet regime. See statements of Secretaries of State Colby and Hughes, printed in *Russian Socialist etc. Republics v. Cibrario*, 235 N. Y. 255, 263-265. In 1933, the President not only reversed the policy of nonrecognition, but, as we

have stated, removed the objection to the Soviet policy of nationalization on which nonrecognition had, in part, been based. The avowed purpose of the recognition and Assignment was to remove "all questions outstanding" between the two governments and, in particular, to facilitate the settlement of American claims against the Soviet Government, and the removal of the prior objection to the Soviet nationalization policy was manifestly for the same purpose. By accepting the Assignment, the President must have determined that, in order to achieve these ends, the United States should disavow any concern in what the Soviet Government had done with respect to the property of its nationals. Indeed, no other conclusion accords with the usual assumptions of friendly international relations.*

The enforcement of a state policy against confiscation would restore the very obstacle to friendly relations which it was the purpose of the President to remove. The executive action therefore

* It is true, as we show below, that the results of this interpretation of the executive intention brings the national policy into conflict with, and thereby invalidates, the state policy. This result, however, is no reason for refusing to give the executive policy the construction which we have suggested. An executive agreement, like a treaty, should be construed in the spirit of *uberrima fides* to promote cordial relations between the parties (*Tucker v. Alexandroff*, 183 U. S. 424, 437) and so as to promote equality and reciprocity (*Grosfroy v. Riggs*, 133 U. S. 258, 271), even though this may bring a state law into conflict with the compact. *Nielsen v. Johnson*, 279 U. S. 47, 52.

necessarily implies an intention to preclude the states from enforcing a contrary policy. On this aspect of the case, *Hines v. Davidowitz*, 312 U. S. 52, furnishes persuasive authority. There this Court found a conflict between the federal Alien Registration Act and a state enactment on the same subject, although the federal statute did not expressly prohibit state legislation and the provisions of both statutes could have been simultaneously enforced. The Court emphasized that for many years the Congress had refused to provide for the registration of aliens because of objection to certain provisions of proposed bills on the subject which it feared might unduly harass the aliens. The Court pointed out that Congress had deliberately omitted these objectionable features in the statute enacted and had included therein certain safeguards for the aliens. The state statute, on the other hand, contained the very provisions which the Congress had deliberately omitted. In these circumstances the Court held that the federal act evidenced a Congressional intention to protect aliens from undue harassment and that its enactment therefore precluded enforcement of state legislation which might engender the evil consequences against which the Congress had sought to guard. In reaching this conclusion, the Court emphasized that the legislation was "in a field which affects international relations, the one aspect of our government that from the first has been

most generally conceded imperatively to demand broad national authority." *Id.*, 68.

In this case there is even stronger reason for believing that state action contrary to the federal policy was intended to be precluded. In the direct conduct of our foreign relations the Federal Government and, in this case, the President, have exclusive authority and both in legal theory and traditional usage speak for the entire nation. It can scarcely be supposed, therefore, that, while dealing with the Soviet Government in respect of the settlement of debts between the two nations, an exclusively federal function, the Chief Executive of the United States would have declared that any objections to the nationalization of the property of Russian nationals should be waived in the interest of friendly relations and yet have intended to allow the states to frustrate that national policy by enforcing a contrary local policy. This is not a case in which there is room for the concurrent enforcement of differing national and local policies; the two policies here are directly opposed and the enforcement of either must necessarily defeat the other.

This Court did not hold to the contrary in *Guaranty Trust Co. v. United States*, 304 U. S. 126. That case dealt only with the question whether the Litvinov Assignment was intended to remove defenses to the merits of the assigned claims which would otherwise exist under local law regardless of

the ownership of the claims. The issue was no different than that which would have been involved if a claim of title to realty asserted by a Russian national had been rejected on the ground that the deed was defective under the law of the state in which the property was located. This is the type of question which is ordinarily governed by the local law of the states and which the Executive Department is not equipped to and ordinarily does not undertake to decide. In the absence of some indication to the contrary, therefore, it may reasonably be assumed that the Executive Department did not pass upon such questions in recognizing the Soviet regime or in accepting the Litvinov Assignment. The Government made no argument to the contrary in the *Guaranty* case, its primary contention being that there was a distinction between right and remedy, and that if the right was not barred, the United States was under a duty to the Soviet Government to provide a remedy.

It is true that the invalidation of any claim on the ground that it is defective under state law regardless of ownership tends to lessen the effectiveness of the agreed method for the settlement of American claims against the Soviet Government. But there is nothing to indicate that the President ever considered the question whether such defects should be removed in order to facilitate the settlement of American claims; indeed, apart from the Volunteer Fleet Corporation

claim, no specific claim was even mentioned in the Assignment.

The question whether the confiscatory character of the nationalization decrees should be deemed a bar to the enforcement of the assigned claims stands on a very different footing. As we have shown above, this is a question which the President must necessarily have considered at the time of negotiating for the Assignment and acceptance of the Assignment must therefore necessarily be deemed to reflect an executive determination that, in the interest of friendly relations with the Soviet Government, this objection should not be asserted.

The validity of the executive policy: The validity of the federal policy, if embodied in a formal treaty, would not be open to doubt, even if it be assumed that the states have concurrent power to regulate the subject in the silence of the Federal Government. *Santovincenzo v. Egan*, 284 U. S. 30; *Hauenstein v. Lynham*, 100 U. S. 483; *Sullivan v. Kidd*, 254 U. S. 433; *Asakura v. Seattle*, 265 U. S. 332; *Missouri v. Holland*, 252 U. S. 416;

The policy of the Assignment may arguably make local law inapplicable in other respects not here pertinent. Conflicting state law operating in a field intimately and exclusively related to the field occupied by the Assignment should not prevail. Thus in other cases arising under the Assignment the Government urges that the policy of marshalling Russian assets for American creditors and the principle of immunity of the foreign sovereign from suit require that set-off of claims against the State of Russia be limited to the same transaction as the claim sued upon.

Terrace v. Thompson, 263 U. S. 197, 222-224; *Frick v. Webb*, 263 U. S. 326; *Hines v. Davidowitz*, 312 U. S. 52, 69, fn.³ The sole issue with respect to the validity of the executive policy, therefore, is whether the powers of the President in the conduct of foreign relations include the power, without the consent of the Senate, to determine the public policy of the United States with respect to the Soviet nationalization decrees. This question, we submit, must be answered in the affirmative.

It is settled that "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government". *Guaranty Trust Co. v. United States*, 304 U. S. 126, 137; *Welton v. Hoyt*, 3 Wheat. 246, 323; *Jones v. United States*, 137 U. S. 202, 212. The authority of the political department is not

³The Fifth Amendment has no bearing. The public policy embodied therein has no application to the action of foreign powers with respect to the property of their nationals, particularly their corporate nationals. *United States v. Belmont*, 301 U. S. 324, 332. On this point there was no dissent in the *Belmont* case. Nor is there any suggestion that a public policy contrary to that of the Chief Executive may be found in an act of Congress or treaty. And the courts have no independent power to formulate a public policy of the United States. The only sources of law from which the courts may derive such policy are the Constitution, Congressional enactments, treaties and executive acts. *Kennett v. Chambers*, 14 How. 38, 50; *Guaranty Trust Co. v. United States*, 304 U. S. 126, 137-138; cf. *Board of Commissioners v. United States*, 308 U. S. 343, 349-350.

limited, however, to the determination of the government to be recognized. The President is also empowered to determine the policy to govern the question of recognition. Objections to the President's determination of the government "as well as to the underlying policy" must be addressed to the political department. *Guaranty Trust Co. v. United States*, *supra*, at 137-138. Such has long been the settled doctrine of this Court. *Kennett v. Chambers*, 14 How. 38, 50.

The power to formulate policy may also be rested on the President's power to enter related agreements for the settlement of outstanding questions affecting the determination of the question of recognition. Limited or conditional recognition is well known to international law and is often a necessary instrument in the conduct of foreign relations. 1 Moore, *Digest of International Law* (1906) sec. 27, pp. 73-74; 1 Hackworth, *Digest of International Law* (1940) secs. 34, 48. The recognition of the Soviet Government was itself accompanied by several undertakings by that Government to be fulfilled both in its own territory and in this country. 1 Hackworth, *loc. cit. supra*. In return, the United States assumed certain obligations toward the Soviet Union. To establish such mutual rights and duties was not outside the plenary authority of the President to recognize foreign nations. As the New York Court of Appeals

observed in *Russian Reinsurance Co. v. Stoddard*, 240 N. Y. 149, 168:

* * * the responsibility rests upon that branch of our government to determine in the first instance whether and upon what terms the Soviet government should hereafter be recognized * * *

The Litvinov Assignment was plainly a legitimate exercise of the President's authority to determine the conditions of recognition. The claims of American nationals against Russia had been one of the principal obstacles to the establishment of friendly relations and the use of Soviet assets to satisfy those claims was a reasonable means of reaching a settlement. To effectuate the agreement the President could therefore remove any grounds of domestic policy which might prevent such use of the Soviet assets.

Independently of his powers in respect of recognition, the President has power to establish a national policy under his authority to make agreements with foreign powers. The authority of the President to enter into executive agreements with foreign nations without the consent of the Senate is established. *Principality of Monaco v. Mississippi*, 292 U. S. 313, 331, *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 306, 316; *State of Russia v. National City Bank*, 69 F. (2d) 44, 48 (C. C. A. 2d); Corwin, *The President: Office and Powers*, 228-240; Sayre, *The Constitutionality of the Trade Agreements Act* (1939) 39 Col. L. Rev.

751; Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940) 35 Ill. L. Rev. 365; Moore, *Treaties and Executive Agreements* (1905) 20 Pol. Sci. Quar. 385, 389-392, 399-417.

That the Litvinov Assignment is an appropriate exercise of the power seems clear. Indeed, one of the most familiar examples of executive agreements are those involving the settlement of claims against foreign nations (see Sayre, *op. cit. supra* at 754, n. 6) and it is evident that the devotion of Soviet assets in the United States to the payment of American claims was a reasonable method of settlement.⁹

The authority of the President to enter into an international compact does not depend in any way on whether the subject is one which the states have the power to regulate in the silence of the Federal Government. The principal reasons, so far as material here, for placing a limitation on the power of the President to execute a "treaty" were (1) the fear of abuse for personal advantage,¹⁰ and (2) the view that vital commercial interests should not be surrendered without the consent of a deliberative body representative of all

⁹ The President, it is true, has apparently refrained from entering into executive agreements obligating the United States to make payments of money (Wright, *Control of American Relations*, p. 244) presumably for the reason that the power of appropriation is vested in Congress. No such difficulty, of course, is presented here.

¹⁰ The Federalist, Nos. 64, 75.

the sections of the country.¹¹ The only special interests of the states which were considered in this connection were those relating to rights of navigation on the Mississippi and, to a lesser extent, coastal fisheries (Warren, *The Making of the Constitution*, pp. 653-658), both of which were dependent on treaties or the law of nations and not on the law of any state. Farrand, *Records of the Federal Convention of 1787, IV* (rev. ed., 1937), p. 58. Neither of these reasons, of course, is applicable to the determination of whether or not the Soviet nationalization decrees are opposed to our national public policy.

• *The supremacy of the executive policy:* Since the formulation of national policy on the recognition of the Soviet decrees is within the constitutional power of the President, it is a "law of the United States" within the meaning of the Supremacy Clause of the Constitution.¹² The theory of the Constitution is that whatever is done by any branch of the Federal Government, acting within its constitutional power, is a "law of the United States". "All constitutional acts of power, whether in the executive or in the judicial department, have as

¹¹ The Federalist, Nos. 64, 75; Warren, *The Making of the Constitution*, pp. 653-658, 773-774.

¹² It is at least arguable that, just as the powers of external sovereignty of the Federal Government do not depend on a constitutional grant (cf. *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 318), so the supremacy of any act of the political departments in this field should be implied without regard to the Supremacy Clause.

much legal validity and obligation as if they proceeded from the legislature; * * *." The Federalist, No. 64. Rules of decision which the Federal courts are empowered to formulate are undoubtedly "laws of the United States". Cf. *Hindlider v. La Plata Co.*, 304 U. S. 92, 109; *Board of County Commissioners of Jackson County v. United States*, 308 U. S. 343.¹³ Executive policy established in the valid exercise of executive authority stands on the same footing.¹⁴

The decision in *Kennett, et al. v. Chambers*, 14 How. 38, is decisive of the issue. In that case suit was brought for specific performance of a contract, made in Ohio, pursuant to which a military officer of Texas agreed to convey land in Texas to the plaintiff in consideration of the plaintiff's agreement to furnish money to the officer to enable

¹³ It may be noted that, under the Rules of Decision Act, Section 34 of the Judiciary Act of 1789, 28 U. S. C. § 725, the "laws of the several States" include state common law decisions. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64.

¹⁴ It was partly because the acts done by each branch of the Government within its constitutional authority were deemed to have the force and effect of law that the consent of the Senate was required for the making of treaties. See The Federalist No. 75. Any inference that the President may not enter into executive agreements without the consent of the Senate has been since overborne by constitutional practice, usage, and by judicial decision. The underlying theory of the framers, however, that every act of any branch of the government within the scope of its constitutional powers has the binding force of law has been consistently confirmed by practice and decision throughout our constitutional history.

the latter to raise and equip troops for Texas' war against Mexico. The contract was made prior to the recognition of the independence of Texas by this country. The contract was held void and unenforceable on the ground that it conflicted with the policy of the Executive Department. The Court found that the Executive Department had deliberately concluded that recognition would have been improper at the time the contract was made and had taken measures to insure this Government's absolute neutrality in the war. The Court then stated (14 How. at 49-50):

The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. * * * our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

The Court, ~~it is true~~, placed some reliance on a treaty between the United States and Mexico recognizing Texas as part of the territory of Mexico, but the opinion expressly proceeded on the ground

that the application of the treaty depended on the policy of the President and that that policy was "obligatory upon every citizen of the Union" (*id.*, 49).

In answer to the contention that the agreement was validated by the laws of Texas after its recognition, the Court held that the executive policy was superior to any state law. The Court pointed to the fact that the contract was made in Ohio as one ground for rejecting the contention, but added (p. 51):

But had the fact been otherwise, certainly no law of Texas then or now in force could absolve a citizen of the United States, while he continued such, from his duty to this government, nor compel a court of the United States to support a contract, no matter where made or where to be executed, if that contract was in violation of their laws, or contravened the public policy of the government, or was in conflict with subsisting treaties with a foreign nation.

The court below has heretofore recognized that the executive policy is binding on the state courts. In *Russian Socialist, etc., Republics v. Cibrario*, 235 N. Y. 255, the Court of Appeals held that, prior to recognition, the Soviet Government could not be permitted to sue as party plaintiff in the New York courts. The decision was placed upon the ground that the federal policy underlying non-recognition was inconsistent with permitting the

Soviet Government to sue and recover property which might be used against the interests of the United States.

The authority of the President to establish controlling national policy in the conduct of foreign relations has also been recognized by the lower New York courts. *Anderson v. N. V. Transandine Handelsmaatschappij (State of the Netherlands, Intervenor)*, 28 N. Y. Supp. (2d) 547 (Sup. Ct.), held that a decree of May 24, 1940, issued by the Netherlands Government in exile, vesting in the State of Netherlands title to all Dutch intangible assets in foreign countries, would be given effect in the New York courts, since the Department of State, at the request of the foreign government, had taken official cognizance of the decree and the enforcement of the decree was therefore in accord with the public policy of the United States.¹⁵ See also *Koninklijke Lederfabriek "Oisterwijk," N. V. v. Chase Nat. Bank*, Sup. Ct., N. Y. Co., N. Y. Law Journal, September 26, 1941. The court, it is true, also found that the New York policy was not opposed. The problem presented by the executive recognition of the Netherlands decree is now one of current and substantial importance. Decrees of like character promulgated by the governments in

¹⁵ In *Hamilton v. Accessory Transit Company*, 26 Barb. 46, 50 (N. Y. 1857), the Supreme Court of New York, General Term, refused to recognize a Nicaraguan decree because it was opposed to the declared policy of the Department of State.

exile of Belgium and Luxembourg have received similar recognition by the Executive Department and, in view of the conditions prevailing abroad, the question may be presented in other situations. It is inconceivable that the states should have the power to frustrate such decrees which have received the imprimatur of the Executive Department of the Federal Government.

C. THE STATES ARE WITHOUT POWER TO DENY EFFECT TO THE SOVIET DECREES ON GROUNDS OF A LOCAL PUBLIC POLICY AGAINST CONFISCATION EVEN IN THE SILENCE OF THE FEDERAL GOVERNMENT

If, despite the contentions which we have advanced, this Court should hold that the Litvinov Assignment does not reflect a federal policy in conflict with the local policy enforced by the court below, the further question would be raised whether, in the silence of the Federal Government,¹⁰ the states have any power to deny effect

¹⁰ By "silence" of the Federal Government is meant the absence of any policy on the specific subject of enforcing Soviet nationalization of property located here. To what extent recognition or nonrecognition embodies any specific policy depends upon the particular circumstances of the case. *Cf. Russian Socialist, etc., Republic v. Cibrario*, 235 N. Y. 255, 263. *De jure* recognition may sometimes be withheld without hostility to the policy or principles of the unrecognized regime or without any indication of a policy against normal intercourse outside of the diplomatic sphere. See Jaffe, *Judicial Aspects of Foreign Relations*, p. 112. In such a case the Federal Government might be considered to have remained silent with respect to any question not involving the mere right of embassy. In the case of a recognized government, it may likewise appear that there is no

to the Soviet decrees because they offend against the moral principles of the forum. It is our position that the states have no such power, because a refusal to enforce the Soviet decrees on grounds of a public policy against confiscation is a hostile act and is calculated to disturb our relations with the Soviet Government. In view of the slight interest of the state in the succession to the title of assets of foreign corporate nationals located within the state, and of the very large interest of the nation in assuring that our relations with a

relevant federal law or policy if the act of recognition, in the case of a revolution, is shown to have been intended merely for the purpose of establishing normal diplomatic relations, leaving for future negotiation other differences between the two governments, or, in the absence of a revolution, if it appears that the Federal Government has taken no position with respect to the particular act or law of the foreign government in controversy. The implications of the recognition of Russia in 1923 and the Litvinov Assignment, as a matter of executive intention, have been discussed above.

It may also be strongly argued that the maintenance of friendly relations of itself embodies a general federal policy, and that a hostile state act which is calculated to disturb friendly relations is in conflict with such general policy. It is not necessary for us to stress this view here, however, since the issue it poses to the Court is precisely the same as that discussed in the text, namely, whether the particular state action under review is a hostile act. The only difference is one of legal theory. Under the principles enunciated in the text, state action amounting to a hostile act is forbidden by the Constitution in the silence of the Federal Government; under the view that the maintenance of friendly relations of itself embodies a general federal policy, hostile state action is forbidden by the superior force of the determination of the political departments.

friendly power shall not be disturbed, we believe it clear that no discrimination against a fundamental foreign law on moral grounds may be made unless the political departments of the Federal Government determine that such discrimination does not conflict with the interests of the nation.

As this Court recently observed in *Hines v. Davidowitz*, 312 U. S. 52, 63, "Our system of government * * * imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference". State action "in a field which affects international relations" must therefore be "restricted to the narrowest of limits." *Id.*, at 68; *The Chinese Exclusion Case*, 130 U. S. 581, 606; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 319. That the question whether the Soviet nationalization decrees shall be given effect here is one touching the conduct of our foreign relations is evident from the basic character of the decrees in the Soviet system and the vital interest of the Soviet Government in the enforcement of its fundamental laws to the full extent of their intended application. Wohl, *Nationalization of Banking Corporations in Russia* (III) (1927) 75 U. of Pa. L. Rev. 622, 638. It is equally clear that, as between the State of New York and the Federal Government, the question is primarily, if not solely, one of national concern.

As it arises in the present proceedings, the issue is the narrow one whether New York must recog-

nize the Soviet Government or its assignee as the successor to the assets in New York remaining after the payment of all enforceable claims. If the normal rules of the New York law of conflicts had been applied, the Soviet right of succession would have been recognized (see pp. 67-68, *infra*). In denying this right the court below discriminated in its application of foreign law because of a local policy against confiscation. The validity of this discrimination must be rested either on the right of the state to protect its own institutions against subversive acts by withholding the benefits of property here from a foreign revolutionary government (cf. *Russian Socialist etc. Republics v. Cibrario*, 235 N. Y. 255, 263) or on the moral right of any state to refuse to assist in the enforcement of laws founded on principles abhorrent to the local forum. Cf. *Griffin v. McCoach*, 313 U. S. 498. The court below did not place its decision on the first ground and it could not rationally have done so since any recovery is to be used for the settlement of American claims and there is therefore no possibility that it will be used to promote subversive activities. The moral basis is equally insufficient.

This Court has held that the courts of this country may not sit in judgment on the acts of a foreign sovereign done within its own territory. *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Ricaud v. American Metal Co.*, 246 U. S. 304. In the *Oetjen* case the ruling was that a title acquired under an act of confiscation abroad could not be

successfully challenged "by this or any other American court" when the property was brought within the custody of a local court. 246 U. S. at 304. The Court concluded that, in accordance with the principle that "every sovereign state is bound to respect the independence of every other sovereign state" (*Underhill v. Hernandez*, 168 U. S. 250, 253), no court of this country, state or federal, could examine into the validity of the act of confiscation and that any remedy must be found in the courts of the foreign sovereign "or through the diplomatic agencies of the political department of our Government." 246 U. S. at 303, 304. The Court further stated (246 U. S. at 303-304):

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. *To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."* [Italics supplied.]

While the objection to the act of confiscation in the *Oetjen* case was based on a supposed rule of international law (246 U. S. at 304), the doctrine announced is fully applicable where the foreign law is attacked on grounds of local public policy. Cf. *A. M. Luther v. James Sager & Co.* [1921], 3 K. B. 532, 558 (C. A.); *Dougherty v. Equitable Life Assur. Co.*, 266 N. Y. 71, 85, 90. On this point the Court was apparently unanimous in the *Belmont* case. See 301 U. S. at 333.¹⁷

The suggestion in the opinion below (280 N. Y. at 311) that the doctrine of the *Oetjen* case has no application to property in the "custody" of a state and located outside the territorial limits of the foreign sovereign is without foundation. As a matter of conflicts of laws, the rule which denies effect to foreign laws, otherwise applicable, upon grounds of local public policy extends to acts of a foreign sovereign in respect of property within such sovereign's own territory as well as to those

¹⁷ As Lord Justice Scrutton said in *Luther v. Sager* [1921], 3 K. B. 532, 558-559 (C. A.): "* * * But it appears a serious breach of international comity, if a State is recognized as a sovereign independent state, to postulate that its legislation is contrary to essential principles of justice and morality." Such an allegation might well with a susceptible foreign government become a *casus belli*; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign had recognized. * * *. The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges."

purporting to reach property of its nationals having a situs outside its territorial jurisdiction. *Dougherty v. Equitable Life Assur. Co.*, 266 N. Y. 71, 90; cf. *Griffin v. McCoach*, 313 U. S. 498. The rule of the *Oetjen* case must thus be rested on the broad ground that for the courts of one country to pass judgment on the decrees of a foreign sovereign would tend to disturb the peace of the nations.

In this view, the reach of the rule in the *Oetjen* case cannot be made to depend upon the situs of the property affected by the decrees. To pass judgment on the foreign law may well be considered by the foreign government as much a hostile interference in its internal affairs where the property involved is located here as where it is located abroad. There can be little question, particularly in the light of current events, that discriminatory non-intercourse, diplomatic, economic and even judicial, is apt to be regarded by the disfavored nation as a hostile sanction similar to armed intervention.¹⁸ The rights of external sovereignty incident to recognition and the privileges of access to world trade and of comity in foreign courts are vital to the welfare of every nation. Even the non-discriminatory denial of such rights or privileges may be

¹⁸ In the exchange of communications preceding the recognition of the Soviet Government in 1933, the Soviet Government agreed "that it will waive any and all claims of whatsoever character arising out of activities of military forces of the United States in Siberia, or assistance to military forces in Siberia, subsequent to January 1, 1918

a matter of grave concern to foreign powers. Cf. *Chy Lung v. Freeman*, 92 U. S. 275, 279 (immigration). Where the denial is discriminatory and is based on disapproval of the fundamental policy of a particular foreign power, the danger that it will be regarded as a hostile act is clear.¹⁹ See *A. M. Luther v. James Sagor & Co.*, note 17, p. 50, *supra*.

The Constitution forbids the states to create difficulties with foreign powers for which the nation as a whole will be held to answer. It was in this view that the Federal Government was granted exclusive power to conduct our foreign relations. *Hines v. Davidowitz*, 312 U. S. at 63-64; *Chy Lung v. Freeman*, 92 U. S. 275, 279-280;

¹⁹ This is manifestly so of diplomatic non-recognition based on opposition to the political, social and economic principles of the unrecognized regime. See Jaffe, *Judicial Aspects of Foreign Relations*, p. 111; Borchard, *The Unrecognized Government in American Courts* (1932); 26 Am. J. Int. L. 261. The same may be true of the regulation of exports discriminating among nations on the basis of their foreign policy. And, in view of the importance of access to foreign courts for the protection of commerce and property interests abroad, the discriminatory withholding of the right to sue or the discriminatory denial of effect to fundamental foreign law on grounds of public policy must be deemed to stand on the same footing. In at least one instance, in the case of negotiations concerning a commercial treaty between the French Government and Soviet representatives prior to *de jure* recognition, a refusal of the French Tribunal de la Seine to apply the Soviet nationalization decrees upon grounds of public policy apparently resulted in the termination of the negotiations and the departure of the Soviet representatives. See Wohl, *Nationalization of Banking Corporations in Russia*, III, (1927) 75 U. of Pa. L. Rev. 622, 638.

The Federalist Papers, Nos. 3, 80. Even non-discriminatory state regulation of the admission of aliens has therefore been condemned by this Court because of the danger of a grave disturbance of our relations with foreign powers, notwithstanding the admitted interest of the states in the character and responsibility of aliens admitted to a local port. *Henderson v. Mayor of New York*, 92 U. S. 259, 273-274; *Ghy Lung v. Freeman*, 92 U. S. 275, 279-280. The discriminatory refusal of a state to give effect to a foreign act of confiscation can have no greater validity. Such a discrimination is no less likely to disturb our friendly relations with a foreign power and the interest of the state is even more remote.²⁰ This is the conclusion required by this Court's decision in the *Oetjen* case where the property involved was located abroad. As we have shown, the danger of disturbing friendly relations is no less where the property is located here.²¹

²⁰ As previously observed (*supra*, p. 46n), this result may also be rested on the ground that hostile state action is in conflict with the general policy of the Federal Government reflected in the maintenance of friendly relations with the Soviet Government. Cf. *Kennett v. Chambers*, 14 How. 38.

²¹ The decision below cannot be supported on the ground that an assertion of sovereignty beyond the territorial limits of the sovereign is never given effect abroad. Cf. Wohl, *Nationalization of Banking Corporations in Russia*, III (1927), 75 U. of Pa. L. Rev. 622, 626, 634-637. The court below did not place its decision upon any such general principle, a principle which would apply with equal force to the recent decrees of the Dutch, Belgian, and other governments

The controlling principle is that the Constitution forbids the states to take hostile action against a foreign power without the consent of the Federal Government. The reach of the prohibition is measured accordingly. Where the states, by reason of some significant contact with the subject matter of the proceedings, have uniformly applied their own internal law to the exclusion of the law of other states having some contact with the matter involved, regardless of the content of the foreign law, it probably would not be a hostile act to apply the local internal law to the exclusion of the foreign law. And, since the question whether it is a hostile act to refuse to apply the foreign law depends on the interest of the foreign state in the enforcement of the law, a distinction may possibly be drawn between the discriminatory denial of effect to a "private" foreign law and the non-recognition of an act of state or fundamental law, the enforcement of which is of manifest concern to the foreign sovereign. But where, as here, the only local interest is opposition on grounds of public policy to the fundamental law of a foreign power, and where the sole contact of the state is jurisdiction over the property involved, the discriminatory refusal to give effect to

in exile nationalizing assets of their nationals in this country in connection with the prosecution of the war. Cf. *Anderson v. N. V. Transandine Handelmaatschappij*, 28 N. Y. Supp. (2d) 547. The decision below discriminates against the Soviet decrees solely upon the ground of a local public policy against confiscation.

the foreign law must be deemed an invalid hostile act.²²

II

THE DECISION BELOW CANNOT BE RESTED UPON ADE-
QUATE NON-FEDERAL GROUNDS.

Respondent urges (Br. in Opp. ^{pp. 10-11} —) that this Court may not decide the federal question discussed in the preceding point because the decision below can be supported on either of two non-federal grounds: (1) that the Soviet decrees were not

²² The decisions as to the right of the state of the forum to refuse effect on grounds of local policy to the laws of another state even where the forum has little or no contact with the transaction in controversy (cf. *Griffin v. McCoach*, 313 U. S. 498; *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 110) have no bearing on the power of the states to make a hostile discrimination against the basic laws of a foreign power. Cf. *Oetjen v. Central Leather Co.*, *supra*.

Even if it be held that the states have power to refuse to enforce foreign laws abhorrent to the forum, the principle that, in matters touching the conduct of our foreign relations, state action must be "restricted to the narrowest of limits" (*Hines v. Davidowitz*, 312 U. S. 52, 68) would require that the state action be limited to a denial of jurisdiction of the state courts. Cf. *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 106, 110, 112. The United States would thus be free to sue in the federal courts, since a state restriction on the jurisdiction of the state courts is not binding on the federal courts. Decisions which cast doubt on the validity of the suggested distinction between a denial of jurisdiction and a binding determination on the merits where the enforcement of the law of a sister state is involved (cf. *Pacific Ins. Co. v. Commissioner*, 306 U. S. 493, 504 with *Bradford Elec. Co. v. Clapper*, 286 U. S. 145, 160) are irrelevant since they do not involve state action touching the conduct of foreign relations. Cf. *Oetjen v. Central Leather Co.*, *supra*.

intended to cover the assets of Russian insurance companies located in this country; and (2) that the New York branch of the Insurance Company was, under New York law, a separate juristic entity with title to the local assets and that succession to its surplus funds is therefore governed by the New York and not the Russian law of succession. We show in Point III that no issue with respect to the scope of the Soviet decrees was raised by respondent or decided by the court below and that the decision may not, therefore, be rested on that ground. In this section of the brief we discuss the other alleged non-federal ground of decision.

Approach to the question is complicated by the confused reasoning of the *Moscow* opinion. Analysis of the opinion demonstrates clearly enough, however, that, despite the discussion of the separate juristic entity of the New York branch of the Insurance Company, upon which respondent relies for his contention, the basis of the decision was intended to be and must have been (*supra*, p. —), the view that the Soviet decrees, because of their confiscatory character, are contrary to the local public policy. No other interpretation adequately explains the conclusion reached. And, under any other construction of the opinion, the decision would be so palpably without basis in New York law as to require invocation of the rule that, where a federal right is asserted, neither plainly unten-

able non-federal grounds (*Postal Tel. Cable Co. v. Newport*, 247 U. S. 464, 475; *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U. S. 157, 164; *Ward v. Board of County Comm'rs of Love County*, 253 U. S. 17, 22; *Ancient Egyptian Order v. Michaux*, 279 U. S. 737, 745, 749) nor any cloak or pretext to evade the federal claim (*Vandalia Railroad v. Indiana ex rel. South Bend*, 207 U. S. 359, 367; *Leath v. Thomas*, 207 U. S. 93, 99; *Davis v. Wechsler*, 263 U. S. 22, 24; *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651, 655; *McCoy v. Shaw*, 277 U. S. 302, 303-304) can preclude this Court from deciding the federal question.

A. THE DECISION BELOW WAS IN EXPRESS TERMS BASED ON THE GROUND THAT ENFORCEMENT OF THE SOVIET DECREES IS CONTRARY TO NEW YORK PUBLIC POLICY AGAINST CONFISCATION.

As the court below held, the New York branch of the First Russian Insurance Company, whatever its juristic character, has been liquidated and has "ceased to exist" (280 N. Y. at 310). The court held that in these circumstances the First Russian Insurance Company, but for its dissolution, would have had "residual rights" to the surplus assets of the New York branch (*id.*, 314). It was in this view that the court below, prior to the recognition of the Soviet Government, directed that surplus funds remaining after the payment of creditors should be paid over to the directors of the "parent" corporation. *Matter of*

People (Russian Reinsurance Co.: First Russian Ins. Co.), 255 N. Y. 415. The court further recognized that, as a matter of New York conflict of laws, the succession to the rights of foreign corporations is ordinarily governed by the law of the domicile. Thus, the court stated that the surplus funds of the New York branch of a foreign insurance company would ordinarily be transmitted to the corporation at its domicile or to its domiciliary liquidator or administrator (*id.*, 299, 310). The issue confronting the court in this case, therefore, was whether the ordinary rules of the New York law of conflicts should be applied or whether, on the other hand, the Soviet decrees establishing the Soviet Government as successor to the Insurance Company under the law of the domicile should be denied effect because of their confiscatory character.

The starting point and basic premise of the decision below was that a question of conflicts or choice of law is one of local law. In this view, the court below held that the question whether the Soviet decrees, if intended to reach the property in controversy, should be given that effect in the courts of New York, is one of New York law (*id.*, 303). The court recognized that, under the doctrine of *Oetjen v. Central Leather Co.*, 246 U. S. 297, "the courts of one [state] will not sit in judgment on the acts of the government of another, done within its own territory" (*id.*, 303), and, apparently, that the courts of New York should therefore give effect to the Soviet decrees with

respect to property or transactions in Russia (*id.*, 305). The rule of the *Oetjen* case was considered inapplicable, however, to assets outside of Russia and beyond the territorial jurisdiction of the Soviet Government (*id.*, 308, 311). The court also recognized that, under the decision of this Court in *United States v. Belmont*, 301 U. S. 324, "when judicial authority is invoked in aid of" consummation of a treaty or executive agreement, "state constitutions, state laws, and state policies are irrelevant to the inquiry and decision" (*id.*, 303). Relying on *Guaranty Trust Co. v. United States*, 304 U. S. 126, however, it held that the Litvinov Assignment merely empowered the United States to "collect the claims in conformity to local law" (*id.*, 304), and, as already stated, the question whether the Soviet decrees were to be given effect was considered a question of local law (*id.*, 303, 304). The *Belmont* case was distinguished on the ground that it arose on a demurrer which the Court of Appeals thought admitted the confiscation, whereas the very question which the court had to decide in the instant case was whether the title had been transferred *in invitum* from its owner to the Soviet Government (*id.*, 309).²³

Accepting these "general principles" as "established premises" (*id.*, 302, 304), the court sought to demonstrate that, by reason of the state's com-

²³ The instant case, it may be noted parenthetically, is the same as the *Belmont* case in this respect.

plete control of the funds in controversy; the funds were beyond the jurisdiction of the Soviet Government and the state was therefore free to determine whether or not to give effect to the Soviet decrees in accordance with "its own public policy" (*id.*, 303). Without determining whether this was true with respect to all property located in New York, the court held that this was the rule in the circumstances of this case. It based this conclusion upon the grounds that the local branch of the insurance company was a "complete and separate organization": (*id.*, 310), that its assets have constituted "a capital corresponding to that of domestic corporations" (*id.*, 309), that the "legal" title to the funds have always been held by a local trustee (*id.*, 308) and that the funds have always been subject to the control of the New York Insurance Department and "in a practical sense has always been in the custody of the State" (*id.*, 308, 310, 313).²⁴

It is important to observe that what was said as to the separate legal personality of the local branch and the "legal" title of the local trustees was not intended to contradict the further holding of the court below that the residual equity in the surplus funds belonged to the Russian corporation.

²⁴ These considerations were discussed in the *Moscow* opinion both on the question whether the Soviet decrees were "intended" to reach the assets involved and on the question "whether, if so intended, the courts of this State would give the decrees such effect" (280 N. Y. at 307).

after the local branch "ceased to exist". Nor did the court, in holding that local law was controlling, purport to overrule its prior decisions (see *infra*, pp. 67-68) that the succession to the residual right of a foreign insurance corporation is normally governed by the law of its domicile; the court made it clear that it meant to include in the local law not merely the internal law of New York as to succession but also such foreign law as by the local law of conflicts is applied in the courts of New York. Thus the court expressly recognized that the surplus funds would normally be transmitted to the domiciliary receiver (*id.*, 299, 310) and also that all claims of foreign claimants might "under our law" be retroactively destroyed by the Soviet decrees (*id.*, 312). The sole relevance of the separate entity theory, as the opinion expressly reveals, was to demonstrate that the doctrine of the *Oetjen* case did not forbid the court to pass judgment on the foreign decrees in this situation and that it was therefore free to apply or not apply the foreign law in accordance with local principles of justice (*id.*, 311).

The court then proceeded to deny effect to the decrees upon the sole ground that they were contrary to a New York policy against confiscation. The consideration of the effect of such decrees, it declared, was "not an agreeable task" to a court which administers law based on the "principles

and traditions of the common law" (*id.*, 311).²⁵ Even so, it would give effect to such decrees to the extent required by the principle that the courts of one state may not sit in judgment on the acts of another government done within its own territory (*id.*, 311). But where, as here, there is "room for choice" by reason of local custody and control, it would be "guided by common law principles and traditions embodied in our Constitution, statutes and judicial decisions" (*id.*, 311-312). Guided by such considerations, the court declined to give effect to the Soviet decrees. One reason assigned for this conclusion was that it had previously invited foreign claimants to prove their claims (*id.*, 312, 313). Even this consideration involved a weighing of relative equities in the light of a local policy against confiscation. But the equity of other claims was not an independent or controlling ground of decision, for the court expressly assumed that it might subsequently be decided that the claims of foreign creditors were all effectively extinguished by the Soviet decrees (*id.*, 313). This question the court found it

²⁵ The Court observed: "It was said by Viscount CAVE in *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse* (*supra*) that 'it is not an agreeable task for a British Court of Justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign State of the assets of private persons 'on the basis of complete confiscation'' (p. 123). It is no more agreeable to an American court which administers law based on the same principles and traditions of the common law." (280 N. Y. at 311.)

unnecessary to pass upon in this case for the reason that the claim of the United States, considered alone, was invalid. "We review the validity of the claim of the United States; defects in the claim of others would not cure invalidity there" (*id.*, 313). It was in this view that the court denied the Government any standing to contest the validity of other claims (*id.*, 312-313).

In brief, the court refused to give effect to the Soviet nationalization decrees even on the assumption that all foreign claimants, creditors and stockholders, might have no equity and the invalidation of the Government's claim might therefore result in an escheat of the surplus funds to the State of New York. It reached this conclusion, not because the "parent" corporation was without any interest in the funds, nor because the courts of New York apply the local law rather than that of the domicile in all cases of succession to such assets (*id.*, 299, 313), but because the content of the foreign law in this case was repugnant to a local public policy against confiscation. In preferring the claims of foreign claimants to that of the Soviet Government, "the courts below have made the proper choice", the court said in conclusion, "not because enforcement of *confiscatory* decrees of property *situated elsewhere* is contrary to our public policy, but because under the law of this State such *confiscatory decrees* do not affect the *property claimed here*" (*id.*, 314; italics supplied).

The theory of the decision gains added clarity when the opinion is read against the background of prior decisions on the question of the extra-territorial effect of the Soviet decrees after recognition. In *Vladhavlzsky Ry. Co. v. New York Trust Co.*, 263 N. Y. 369, 378, an action by a railroad corporation, organized under the old regime in Russia, to recover a sum of money deposited in a New York bank, the court below held that the Soviet nationalization decrees would not be applied to a claim on a debt owing in New York upon grounds of local public policy. Following the decision of this court in *United States v. Belmont*, 301 U. S. 324, however, the court below, in *United States v. Manhattan Co.*, 276 N. Y. 396, a case identical in all respects with the instant case, unanimously held that it was bound to recognize the United States as successor to the interest of a Russian insurance company in the local surplus funds. Subsequent to the decision in the *Manhattan* case and prior to that in the *Moscow* case, this Court rendered its decision in *Guaranty Trust Co. v. United States*, 304 U. S. 126, 143, and in the course of its opinion, declared that the only right acquired under the Litvinov Assignment was one to collect the claims "in conformity to local law". Thereafter in the *Moscow* case, the court below, ignoring the distinction between the validity of the Soviet claims regardless of ownership and the validity of the nationalization of the claims, and viewing the question of choice of law as wholly one of local law,

considered itself free to deny effect to the Soviet decrees upon grounds of a local public policy against confiscation.

The difference in result in the *Manhattan Co.* case, on the one hand, and in the *Moscow* case and the present one on the other, is explicable, not by reason of any change in New York law, but solely on the ground that the court interpreted the intervening *Guaranty* case as permitting it to apply its own public policy with respect to the Soviet decrees in making its choice of law. Any other construction of the *Moscow* opinion leaves unexplained the unanimous holding in the *Manhattan Co.* case—a holding which, as a matter of substantive New York law, the *Moscow* decision does not purport either to overrule or restrict.

B. THE CONCLUSION REACHED BY THE COURT BELOW CANNOT BE EXPLAINED UPON THE GROUND THAT, UNDER NEW YORK LAW, THE LOCAL BRANCH WAS A SEPARATE JURISTIC ENTITY AND THAT SUCCESSION TO ITS SURPLUS FUNDS IS THEREFORE GOVERNED BY THE NEW YORK AND NOT THE SOVIET LAW OF SUCCESSION

Respondent contends that the decision below was based upon a holding that, under New York law, the local branch of the Insurance Company was a separate juristic entity and that the succession to its assets is therefore governed by the New York rather than the Soviet law of succession. A sufficient answer is that, as we have shown above, the decision was expressly based on the sole ground of the local public policy against confiscation. A further answer is that respondent's

theory does not provide an intelligible rationale of the decision and therefore could not have been intended as the basis of the court's holding.

We may assume for purposes of the present argument that the court below did hold that the New York branch of the First Russian Insurance Company was a separate juristic entity with title to its assets. Even on this assumption, however, there must still be some person or persons entitled to the surplus funds of that entity after it has ceased to exist and all valid claims have been paid. The very issue confronting the court below was the determination of the person or persons to whom this "residual right" belonged. Indeed, the court specifically recognized in its holding, already adverted to, that if the "parent" Russian company had continued to exist, it would have been entitled to the surplus funds. 280 N. Y. at 299, 310, 314.

It is entirely apparent, therefore, that acceptance of the concept that the local branch of a foreign insurance company is a separate juristic entity does not, under New York law, preclude the existence of a residual right in the "parent" company. And, since the United States claims as successor to the residual right of the "parent" company, it is equally obvious that its claim may not be denied on the bare ground that the New York branch had been a separate entity to which the assets had belonged prior to the dissolution of the branch. In order to support the decision on the theory which he advocates, there-

fore, respondent must show, not only that the local branch is a separate entity, but also that, upon dissolution of the "parent" company, the New York law does not, as a matter of its normal conflict of laws, recognize the succession to the residual rights of the "parent" company established by the law of its domicile.

Nothing in the *Moscow* opinion in any way suggests that the court below intended to enunciate this proposition. And it is directly opposed to the long and firmly established principle of the New York law of conflicts that foreign law alone determines whether a foreign corporation, including a foreign insurance corporation, has been dissolved and, if dissolved, who is entitled to be recognized as successor to its rights. *Russian Re-insurance Company v. Stoddard*, 240 N. Y. 149, 154-155, 167; *Dougherty v. Equitable Life Assurance Soc.*, 266 N. Y. 71; *Kosolapoff v. P. M. K. Bank*, 276 N. Y. 499; *Murray v. Vanderbilt*, 39 Barbour 140, 146 (N. Y. 1863); *Matter of National Surety Co. (Laughlin)*, 283 N. Y. 68, 76-77; *Matter of Lehigh v. Sixth Ave. Bancorporation, Inc.*, 251 App. Div. 391, 393-394 (1st Dept.); cf. *Issaia v. Russo-Asiatic Bank*, 266 N. Y. 37, 43; *Holzer v. Deutschereichsbahngesellschaft*, 277 N. Y. 474. Thus, New York has always given effect to the law of the domicile for the purpose of ascertaining the primary receiver, statutory liquidator, or other proper successor at the domicile. *People v.*

Granite State Provident Assn., 161 N. Y. 492; *Martyn v. American Union Fire Ins. Co.*, 216 N. Y. 183; *Matter of People (Norske Lloyd Ins. Co.)*, 242 N. Y. 148, 166; *Warren Ross Lumber Co. v. Daniel Clark & Son, Inc.*, 211 App. Div. 591, 593 (4th Dept.); *Drury v. Doherty*, 127 Misc. 263, 266; 131 Misc. 642 (Sup. Ct.); cf. *Clark v. Williard*, 294 U. S. 211, 214-215; Restatement of Conflict of Laws, New York Annotations, Secs. 552-553, pp. 342-343.

In view of this long line of unchallenged decisions, it is manifest that the refusal of the court below to recognize the rights of succession established by Soviet law to the Insurance Company's "residual right" in the assets of the New York branch of the Company, regarded as a separate juristic entity, was based, not upon the ground that the foreign law is never applicable in determining rights of succession, but on the ground that the particular Soviet decrees here involved, because of their confiscatory character, would not be given the same effect normally attributed to foreign law. This view does not make the court's discussion of the separate entity theory gratuitous; that discussion was intended to establish, as we have already suggested (p. 61, *supra*), that, despite the ruling in the *Oetjen* case, the court was free in the circumstances of this case to pass judgment on the law of the domicile.

C. THERE IS NO BASIS IN NEW YORK LAW FOR THE CONCLUSION THAT THE LOCAL BRANCH WAS A SEPARATE JURISTIC ENTITY WITH TITLE TO THE LOCAL ASSETS

Should our analysis of the opinion below be rejected and the decision be held, on some theory, to rest upon the conclusion that the New York branch of the Insurance Company was a separate juristic entity with title to the local assets, this Court would be called upon to determine whether there is any fair and substantial basis in local law for that conclusion. It is established, of course, that where a federal right is asserted, this Court determines for itself whether the non-federal basis independently and adequately supports the judgment. *Broad River Power Co. v. South Carolina ex rel. Daniels*, 281 U. S. 537, 540; *id.*, 282 U. S. 187; *Abie State Bank v. Bryan*, 282 U. S. 765, 773; *Lawrence v. State Tax Commission*, 286 U. S. 276, 282. That rule is fully applicable to this case, since the alleged non-federal ground here is palpably untenable and consequently cannot preclude this Court from deciding the federal question. See authorities cited at p. 57, *supra*.

Judge Rippey, speaking for the minority of the court below in the *Moscow* case, declared (280 N. Y. at 318):

* * * there is no foundation in our statute law, in the decisions of our courts, in reason, logic or elsewhere for the assertion that the branch of a foreign corporation

is a juristic, legal or factual entity, separate and distinct from the parent company, or that it may be placed in the same position as a domestic corporation as to rights and obligations and capable independently to perform corporate functions.

No other view is permissible. There is not the slightest basis for the contention that the New York Insurance Law (Consol. Laws, ch. 28) requires a divorce of ownership of the assets used in the local business and of juristic personality.²⁶ To the contrary, Section 27 of the Insurance Law expressly contemplates that corporations organized "under the government or laws of any state or country outside of the United States" may be "authorized to transact the business of fire or marine or fire and marine insurance in this state, * * *." After directing that such a foreign corporation must deposit certain sums as security for the protection of all of "its" policyholders and creditors "within the United States", Section 27 proceeds to define "the capital of such a foreign insurance corporation". In the same provision, the act speaks of periodic reports required

²⁶ The sections of the Insurance Law referred to in this brief are those which were in effect at the time the local branch was liquidated. The amendments which have been made since are manifestly irrelevant on the question whether the local branch was a separate legal entity. It is arguable that the only pertinent provisions are those which were in effect at the time the local branch was established, but the decision below is most favorably viewed if tested by the provisions in effect at the time of the liquidation.

by law of "such a foreign insurance corporation", and directs the Superintendent of Insurance, upon the basis of such reports or independent data, to determine the amount of "such capital" and issue a certificate with regard thereto to "such corporation". Section 27 then provides that, in the event the "capital of such a foreign insurance corporation" is reduced below the amount previously required, the Superintendent shall issue a requisition to "such corporation" through "its" United States "manager or attorney"—not, be it observed, its local domestic corporate subsidiary, which, of course, never existed and was never in the contemplation of the statute.

Next, Section 27 provides for the investment of the required deposit and in this connection speaks of "the capital of such a foreign insurance corporation" and distinguishes the "funds of such a foreign insurance corporation", which latter are not required to be deposited. Section 27 further provides that when securities or other property of "such a foreign insurance corporation" is held by trustees, the trustees shall be appointed by "the board of managers or directors of such corporation". Every other reference in the section expressly recognizes that the local branch is a part of and not a juristic entity separate from the "foreign" corporation, and expressly distinguishes "foreign" and "domestic" corporations doing business in New York. See Appendix B, p. 124, *infra*.

The distinction between a "domestic" insurance corporation and the local branch of a "foreign" insurance corporation doing business within the state is similarly recognized in all the other pertinent provisions of the Insurance Law. See, *e. g.*, Section 10 (requirements for certificate of authority to transact business); Section 13 (class of securities to be deposited); Section 30 (appointment of Superintendent of Insurance as attorney for service of process on foreign corporations); Section 33 (reciprocal requirements for New York corporations doing insurance business abroad); Section 41 (assessment on stockholders or revocation of license in event of impairment of capital); Section 46 (verification of reports); Section 45 (reports of "assets" of foreign insurance corporations to include statement of assets held "by it or for it" within the United States and not of "its" assets elsewhere unless the Superintendent requires additional information as to "its" total business or any portion thereof); Section 52 (amendment of charter of insurance corporations).

The difference in the powers conferred on the Superintendent where liquidation proceedings are ordered is particularly significant. In the case of a domestic corporation, the Superintendent is vested with title to all the property, contracts and rights of action of the corporation and may deal with all such interests in his own name as Superintendent (Section 63 (3)). In the case of a foreign corporation, however, the Superintendent

is merely directed to take "possession" of the property and "conserve" the assets and is given only such rights and duties with reference to the corporation and its assets as were "heretofore exercised and imposed upon ancillary receivers of foreign corporations in this State" (Section 63 (4)). It may be noted that a chancery receiver in New York has no title to the assets in the absence of statute²⁷ and that no New York statute confers such title upon an ancillary receiver of a foreign corporation. In view of these provisions of Section 63, it is clear that New York expressly undertook, in the case of domestic insurance corporations, to appoint the statutory successor and to vest him with title to the assets, while in the case of foreign corporations it refrained from doing so. The distinction is an express recognition that, in accordance with universally accepted principle, the appointment of such a successor is the business of the state or country of domicile.²⁸

²⁷ See *Herring v. New York E. E. & W. R. R. Co.*, 105 N. Y. 340, 372-373; *Stokes v. Hoffman House*, 167 N. Y. 554, 359-560; *Rinehart v. Hasco Bldg. Co.*, 153 App. Div. 153 (1st Dept.), affirmed without opinion, 214 N. Y. 635; *Clark, Receivers* (2d ed.), Vol. 1, p. 20.

²⁸ The fact that the United States branches were not separate organizations for anything other than the limited purpose of protecting domestic creditors was made clear by the practice of the New York Insurance Department under which United States branches of foreign insurance companies, unlike domestic companies, were not permitted to invest any of their assets in the capital stock of American fire insurance companies (Departmental Ruling, November 24, 1923), and were not permitted to transact business outside

The argument that the Insurance Law seeks to give local claimants the same protection, and the Superintendent of Insurance the same regulatory power, in the case of foreign insurance companies as in the case of domestic companies leads nowhere. As appears from its express language, the statute manifests the purpose of accomplishing this result without a legal divorce of ownership of assets or of juristic personality.

This conclusion is not only compelled by the statutory language but, at least until the *Moscow* decision, it was the settled law of New York. *Matter of People (Second Russian Ins. Co.)*, 256 N. Y. 177, 181; *Matter of People (Northern Ins. Co.)*, 255 N. Y. 433; *Matter of People (Russian Reinsurance Co.)*, 253 N. Y. 415; *Matter of People (Norske Lloyd Ins. Co.)*, 249 N. Y. 139; *James & Co. v. Russia Ins. Co.*, 247 N. Y. 262; *Matter of People (Norske Lloyd Ins. Co.)*, 242 N. Y. 148, 159; *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248; *Matter of People (City Equitable Fire Ins. Co.)*, 238 N. Y. 147; *Matter of People (Second Russian Ins. Co.)*, 244 N. Y. 606, dismissing appeal from 219 App. Div. 46; cf. *Lancashire Ins. Co. v. Maxwell*, 131 N. Y. 286, 290-291.

The first *Norske Lloyd* case, 242 N. Y. 148, the sole authority relied upon by the court below for

the United States (Departmental Ruling, July 7, 1920). Copies of these Departmental Rulings are printed in the Appendix to the Brief for the United States in *United States v. Moscow Fire Insurance Company*, No. 355, October Term, 1939, pp. 139-140.

the view that the local branch of a foreign insurance company is a separate domestic entity, holds exactly the contrary. The question presented in that case was whether the funds deposited by a foreign insurance company with the Superintendent of Insurance for the benefit of local claimants were available to local claimants holding insurance policies issued by the insurance company abroad or only to holders of policies issued in the United States. The court held that the funds were available only to holders of policies issued in the United States on the ground that the purpose of the deposit was to provide security only for the domestic business of the company. In this connection the court observed that the local branch was intended to be treated as a separate organization for purposes of assets and regulation. The court expressly stated, however, that the corporation was a "foreign corporation" (242 N. Y. at 154, 159), it made specific reference to certain differences in the regulatory provisions in respect of "domestic" and "foreign" corporations (*id.*, 160, 161-162), it recognized the receiver appointed at the foreign domicile as the "domiciliary" receiver (*id.*, 164, 166), and accordingly it directed the transmission of the surplus funds to the foreign receiver.²⁹

²⁹ The same view was expressed by the Court of Appeals when the Norske Lloyd Insurance Company's liquidation came before it for a second time. *Matter of People (Norske*

Indeed, the very assumption on which the Court of Appeals has proceeded in directing the Superintendent of Insurance with respect to the disposition of the funds of nationalized Russian insurance companies doing business in New York, is that the New York branches of the companies were distinct and separate only to the extent necessary for the protection of domestic creditors. *Matter of People (Russian Reinsurance Co.; First Russian Ins. Co.)*, 255 N. Y. 415. The court

Lloyd Insurance Co., 249 N. Y. 139. That case involved the question whether domestic creditors were to be allowed interest on their claims during the period of liquidation. Answering protests on behalf of foreign creditors to the effect that the allowance of interest would even further diminish the dividend which they would receive on their claims, the Court of Appeals, speaking through Lehman, J., said (p. 149): "Creditors who have dealt with the insurance company here have more than a preference in the distribution of the proceeds of the assets of the corporation on liquidation, or even than a specific lien upon the assets. They are the only claimants who are entitled to share in that distribution. They are the only persons who on liquidation may be regarded in some sense as the equitable owners of the fund in liquidation. All others must look for satisfaction of their claims to the domiciliary representative of the foreign company and not to the fund here."

³⁰ Chief Judge Cardozo stated (p. 427): "The State of New York is not charged with a duty to wind up the business of these Russian corporations. In aid of domestic creditors, it winds up a branch of such a business conducted within its borders and in submission to its laws (*Matter of People (Norske Lloyd Ins. Co.)*, 242 N. Y. 148). This done, its duty ends, except to turn the surplus over to a competent custodian (Insurance Law sec. 63). * * * *The surplus assets in this State are but a part of the total assets to be administered abroad. We disclaim a continuing duty of*

held in that case that, after the payment of domestic creditors and foreign creditors with valid attachments and executions, the Superintendent should turn over any surplus funds to the directors of the Russian corporations, which were considered not to be dissolved in the absence of diplomatic recognition, so that foreign creditors might pursue any available remedies. The court emphasized its view that the local branches were not separate domestic entities by its express declaration that the Superintendent of Insurance exercised the powers of "ancillary receivers of foreign corporations", as provided in Section 63 of the Insurance Law.

It may be observed, finally, that a decision that the surplus funds were the property of a separate New York entity cannot be reconciled with the holding that foreign creditors having claims based on transactions with the "parent" corporation or with other branches have a right to be satisfied out of the assets of the local branch. For if the United States branch is a separate corporation, such that the title of the United States cannot be recognized because it derives from the parent, then the claims of foreign creditors equally based on transactions with the parent or with other branches cannot be deemed claims which the local branch is obligated to satisfy.

visitation and supervision. * * * Our administrative machinery should be no longer clogged, our liquidator no longer burdened, our courts no longer vexed, with problems not our own." [Italics supplied.]

III

NO ISSUE WITH RESPECT TO THE SCOPE OF THE SOVIET DECREES WAS RAISED BY RESPONDENT OR DECIDED BY THE COURT BELOW

The complaint in the present case alleges that the effect of the Soviet decrees, as a matter of Russian law, was to nationalize the assets of the Insurance Company, wherever situated, including the New York assets now in controversy (R. 23-24). Although the complaint was dismissed on motion and without a trial, respondent contends that the decision below was based in part on a finding of fact, contrary to the allegations of the complaint, that the Soviet decrees were not intended to reach the New York assets and that this is an adequate and independent non-federal ground (Br. in Opp., p. 10).

The basis of the contention is that the court below in the *Moscow* case sustained the referee's finding of fact, entered after a hearing on the issue, that the Soviet decrees were not intended to reach the New York assets. Respondent argues that, since the present case was decided upon the authority of the *Moscow* case, this finding of fact must also be deemed to be one of the grounds of decision here. In support of this contention, it is urged that respondent's motion for summary judgment in the present case was based upon the official record in the *Moscow* case, showing the

facts in the two cases to be identical (Br. in Opp., pp. 7-8).

The argument is without substance. The *per curiam* opinion in the present case reveals on its face that the only questions considered were the questions of law decided in the *Moscow* case. The opinion declares that "this court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the *same rules of law* which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here" (R. 71-72; italics supplied). That the court considered the question of the intended effect of Soviet law as one of fact and not of law is clear from the *Moscow* opinion, where the referee's determination of this issue was sustained on the ground that it was a finding of fact supported by substantial evidence. 280 N. Y. at 306, 310.

There are other considerations which compel the conclusion that the court below did not pass upon the issue of the scope of the Soviet decrees. The respondent did not raise this issue for purposes of the motion. Indeed, it is extremely doubtful under New York law whether he could have raised the issue on the actual pleadings filed. That the court below did not decide this question of practice is shown by the fact that the sole authority for its decision was the *Moscow* case, in which the ques-

tion was not involved. In view of the substantial doubt that respondent was entitled to raise the issue on the pleadings, the court below would certainly not have decided the point in respondent's favor without some explanation.

Respondent moved "pursuant to Rule 113 of the Rules of Civil Practice and Section 476 of the Civil Practice Act, on the ground that there is no merit to the action, and that it is insufficient in law" (R. 10). Section 476 provides for the entry of judgment on the pleadings or admissions of the parties, and allows what may be considered a type of demurrer after answer. Except where admissions of the parties are involved, no issue of fact may be raised or resolved, affidavits and documents are inadmissible, and the court may decide only questions of law. *Lefler v. Clark*, 247 App. Div. 402, 404 (1st Dept.); *Kibbe v. City of Rochester*, 57 F. (2d) 542, 543 (W. D. N. Y.); *Jongers v. First Trust & Deposit Co.*, 147 Misc. 260, 261 (Sup. Ct.).

Rule 113, providing for summary judgment in specified cases, does permit the raising and decision of certain issues of fact, but it is clear that respondent raised no such issue, and the state courts decided none. Respondent's sole supporting affidavit expressly states (R. 13):

There is no dispute as to the facts. The complaint alleges and the verified answer admits the facts concerning the history of

the organization of the United States Branch of the First Russian Insurance Company established in 1827 and the facts concerning the proceedings and litigations involving the said company since its admission to do business in the State of New York in 1907. *The verified answer merely denies certain conclusions of law in the complaint and sets forth six separate defenses to the plaintiff's cause of action. These defenses need not now be considered for the complaint standing alone is insufficient in law and must be dismissed.* [Italics supplied.]

The last paragraph of the affidavit begins with the phrase: "There being no issues of fact to be tried: * * *" (R. 17), and there is no reference whatever to the voluminous testimony and evidence on the Soviet law included in the record in the *Moscow* case, or to the issue of the meaning and scope of the Soviet nationalization decrees. That issue had been expressly raised by the third and fourth affirmative defenses (R. 46-47) which the supporting affidavit declared "need not now be considered" (R. 13).

It is evident, therefore, that the motion did not present any specific issue concerning the proper construction of the Soviet decrees. This being so, it is settled that the general allegations of the complaint with respect to the foreign law must be deemed admitted for purposes of the motion.

Hanna v. Lichtenhein, 255 N. Y. 579; *Pope v. Heckscher*, 266 N. Y. 114, 117; *Moscow Fire Ins. Co. v. Bank of New York*, 280 N. Y. 286, 309.

Moreover, under New York practice, the particular issue of the construction of the Russian law could not properly have been presented by the motion for summary judgment. The only provision of Rule 113, which might have been available to respondent,³¹ and upon which respondent now relies (Br. in Opp., pp. 8-9), is contained in the fifth paragraph, authorizing summary judgment "where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record." Respondent contends that the testimony and evidence introduced in the *Moscow* case represent such "documentary evidence or official record." But this paragraph of Rule 113 manifestly contemplates a case where the document or official record is in itself non-testimonial proof of the defense asserted, such as

³¹ It is settled that the first five subdivisions of Rule 113 do not apply to equitable actions to determine the title to a fund. *103 Park Avenue Co. v. Exchange Buffet Corp.*, 203 App. Div. 739 (1st Dept.); *Newark Fire Ins. Co. v. Mill*, 251 App. Div. 399 (1st Dept.); *Albertson v. Fidelity and Deposit Co.*, 253 App. Div. 801 (1st Dept.); *Fiscella v. Friedman*, 169 Misc. 327 (Sup. Ct.); cf. *Lederer v. Wise Shoe Co.*, 276 N. Y. 459, 463. Subdivisions 6, 7, and 8 of Rule 113 are patently inapplicable upon their face.

a release, decree of a bankruptcy court, or license. See, e. g., *Lederer v. Wise Shoe Co.* 276 N. Y. 459 (decrees of bankruptcy court); *Wels v. Rubin*, 254 App. Div. 484 (1st Dept.), reversed on other grounds 280 N. Y. 233 (alleged libel contained in document submitted to court); *Sweet v. Campbell*, 282 N. Y. 146, 149 (official permit); cf. *Levine v. Behn*, 282 N. Y. 120, 125. Here the "fact" involved was the scope of the Russian decrees as a matter of Russian law. The mass of testimony on this question introduced in the *Moscow* case is not transformed from testimony into an "official record" of the kind contemplated by Rule 113 by being printed and included in the record of a court proceeding. In contradistinction to the type of evidence admissible on motions under the first eight subdivisions of the Rule, this paragraph was specifically designed to preclude reliance by defendants (in actions other than those expressly covered by the first eight subdivisions) on affidavits or other testimonial evidence. See *Lederer v. Wise Shoe Co.*, 276 N. Y. 459, 464. Adherence to this rule is especially desirable where the factual issue pertains to foreign law, as to which, as the Court of Appeals itself has recognized, different trials and varied records can lead to different results. *Dougherty v. Equitable Life Assurance Soc.*, 266 N. Y. 71, 99-100, 110; *Matter of People (First Russian Ins. Co.)*, 255 N. Y.

428, 432; cf. *Lazard Bros. & Co. v. Midland Bank Ltd.* [1933] A. C. 289.³²

Finally, the elementary requirement that the moving party attach to his papers copies of all documents relied on, including court records (*Neff v. Palmer*, 131 Misc. 671 (Sup. Ct.); *Pross v. Foundation Properties, Inc.*, 158 Misc. 304, 307 (Sup. Ct.); *Wels v. Rubin*, 254 App. Div. 484 (1st Dept.)) was not complied with, nor was reference made to any specific documents. Petitioner had no opportunity to object to this omission, since it had no reason to believe that respondent intended to rely upon the evidence in the *Moscow* case as an official record.³³

³² Respondent, not being a party to the earlier action, could not rely upon the decree in the *Moscow* case as *res judicata* (*Rudd v. Cornell*, 171 N. Y. 114, 127; *St. John v. Fowler*, 229 N. Y. 270, 274) and he did not attempt to do so.

³³ If respondent had raised an issue with respect to the intended scope of the Soviet decrees and the court below had passed upon that issue, this Court would have had power, we believe, to review the state court's decision and to determine the scope of the Soviet decrees independently. See the discussion in the Government's brief in *United States v. Moscow Fire Ins. Co.*, No. 355, October Term 1939, pp. 46-51. Even if this Court had no such power, it would have to decide the federal question whether New York may deny effect to the Soviet decrees on grounds of a local public policy against confiscation; the decision of the Court of Appeals in the *Moscow* case on the scope and meaning of the Russian law was largely based on the view that the Soviet decrees could not, as a matter of New York law, cover the New York assets and that therefore the decrees should not be interpreted as intended to cover them. 280 N. Y. 286, 307-310.

CONCLUSION

It is respectfully submitted that the decision below should be reversed.

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APPENDIX A

The opinions in *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286 (1939) are as follows:

LEHMAN, Judge.

[297] Moscow Fire Insurance Company was organized in 1858 as a joint stock fire insurance company under the laws of the Russian Imperial Government. In 1899 it was authorized to transact business in this State in accordance with the provisions of section 27 of the Insurance Law (Consol. Laws, c. 28). That section provides that "no insurance corporation organized and existing under the government or laws of any state or country outside of the United States" shall transact business here unless it "shall have securities or other property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees, as hereinafter provided, for the protection of all its policyholders and creditors within the United States * * *." The statute fixes the amount of the securities or other property which must be so deposited or held in trust and further provides that "for all purposes specified in this chapter, the capital of such a foreign insurance corporation * * * shall be the aggregate value of all securities and other property * * * deposited with insurance departments or state officers and held in trust by a trustee or trustees. * * *." Moscow Fire Insurance Company complied with all the re-

quirements of the statute and [298] through its branch here transacted insurance business in this State under the supervision of the Superintendent of Insurance. In 1918 when the Soviet government, officially described as the Russian Socialist Federated Republic, successfully seized ruling power in Russia, the company had here large capital and its business was prosperous.

In December, 1918, the Soviet government promulgated a decree "declaring all kinds of insurance a state monopoly. * * *

All private insurance companies were to be subject to liquidation and became state property." *Dougherty v. Equitable Life Assur. Society of United States*, 266 N. Y. 71, 82, 193 N. E. 897, 900. Other decrees followed by which the existence of all insurance companies in Russia was terminated, their assets in Russia seized, and their business in Russia became part of a government monopoly. Until 1933 the government of the United States did not accord recognition to the Soviet Republic. The decrees of the Soviet government were completely effective in Russia, but until recognition the decrees of the government could not be given here the force and effect of mandates of a lawful sovereign. Insurance corporations, organized under the laws of a Russian government which had ceased to exist, continued to transact business here through local agents with local capital, in accordance with the statutes of this State, though, as we have said in other cases, at their own domicile their existence was terminated and their property confiscated by decree of a "governmental establishment which actually governs, which is able to enforce its claims by military force, and is obeyed by the people over whom it rules."

Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149, 158, 147 N. E. 703, 705. Such a corporation was actually and effectively dead in Russia. It was legally dead in countries where the Soviet Republic was recognized, and since recognition "is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence" (*Oetjen v. Central Leather Co.*, 246 U. S. 297, 303, 38 S. Ct. 309, 311, 62 L. Ed. 726), belated recognition by the United States might change retroactively a being endowed with life into a corpse. The result is a tangle of juristic [299] rights and obligations which cannot be unravelled by strict logical application of juristic concepts. As we pointed out in *Russian Reinsurance Co. v. Stoddard*, *supra*, 240 N. Y. pages 162, 163, 147 N. E. pages 706, 707, "the situation is, not only without precedent, but anomalous" and "there can be no true precedent in the books, when the facts are unprecedented."

In spite of the fact that the existence of Moscow Fire Insurance Company was, in 1918, terminated in Russia, its home, by decree of the Soviet Republic, it continued to transact business here until 1925 through its local or United States branch. Then by order of the Supreme Court of this State the Superintendent of Insurance took possession as liquidator of the assets of that branch (constituting the capital of the United States branch), pursuant to the provisions of section 63 of the Insurance Law. These assets consisted of securities deposited with the Insurance Department or held in trust for the policyholders and creditors of the company within the United States, as required by the statute. After the Su-

perintendent of Insurance had paid the domestic policyholders and creditors and also the creditors; whether foreign or domestic, who acquired liens by attachment before liquidation was begun, the Superintendent still had in his possession assets of great value. In *Matter of People, by Beha, v. Russian Reinsurance Co. of Petrograd, Russia*, 255 N. Y. 415, 175 N. E. 114, the problem of the disposition that should be made of such surplus assets was presented.

Ordinarily any surplus, remaining after the domestic creditors and policyholders of a foreign insurance company doing business here were paid, would be transmitted to the foreign corporation at its domicile or to the domiciliary liquidator or administrator if the foreign corporation was in liquidation. *Matter of People by Stoddard, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 151 N. E. 159. The decrees of nationalization and confiscation by the unrecognized governmental establishment then ruling in Russia made that course impossible. Cf. *James & Co. v. Russia Ins. Co.*, 247 N. Y. 262, 160 N. E. 364. Alternative courses were urged upon us. The assets of the [300] United States branch which had been taken over by the Superintendent of Insurance under authority of the State might be left in his custody until "a government in Russia is recognized by the United States or until the surplus funds may be transmitted to a liquidator or legal representative of the corporation at the domicile abroad (i. e., in Russia) or in accordance with any provision of a treaty of the United States"; or the court might, in the exercise of its broad powers, provide, in the extraordinary condition then prevailing, an extraordinary method of adminis-

tering and distributing the assets then in the control and custody of the State. The court chose the latter course. *Matter of People, by Beha, v. Russian Reinsurance Co.*, supra, 255 N. Y. page 421, 175 N. E. 114.

In that case we pointed out that "in the silence of the statute, a decree instructing the liquidator as to the administration of the surplus must conform to the exactions of equity and justice." Though "the superintendent of insurance has fulfilled the statutory trust when he has paid the domestic creditors * * * for whom the trust was laid upon him," yet, so we said "the surplus must be made available for the payment of creditors and policyholders with claims founded upon foreign business" and any remainder distributed to those entitled to it, where possible through directors of the corporation. "The present state of the law in respect of these Russian corporations driven from their domicile, and there subjected to decrees of confiscation and extinction has been expounded with a full review of the decisions in a recent judgment of this court. *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N. Y. 23, 170 N. E. 479; cf. *Severnose Securities Corp. v. London & Lancashire Ins. Co.*, 255 N. Y. 120, 174 N. E. 299. The ruling was that they were still juristic persons, and that their boards of directors, represented by a quorum, were still competent to act. The doctrine of that decision controls the case at hand" 255 N. Y. pages 422, 423, 425, 175 N. E. pages 116, 117.

Accordingly the Superintendent of Insurance was directed to pay "to the corporations, represented by directors, a quorum of the board," (255 N. Y. page 424, 175 N. E.

page 117) the surplus remaining after [301] domestic policyholders and creditors had been paid and provision made for vigilant foreign creditors. Moscow Fire Insurance Company was no longer represented by directors, a quorum of the board. It had been left with but one director. He might be treated, so we said, as a conservator, but delivery to conservators was to be conditioned upon the execution of a surety company bond that they would faithfully apply the assets to the use of the corporation, its creditors and shareholders; or, in the event of failure to comply with the condition, the assets might be deposited with a trust company "as agent or depository upon the stipulation of the insurance company and its conservators that the fund will not be withdrawn except upon the order of a court of competent jurisdiction." *Matter of People, by Beha, Moscow Fire Ins. Co. of Moscow, Russia*, 255 N. Y. 433, 435, 175 N. E. 120, 121.

The assets of the company were deposited on April 18, 1933, with the Bank of New York and Trust Company as agent or depository of Moscow Fire Insurance Company and of its sole surviving director and conservator, upon a stipulation that they would not be withdrawn except upon the order of a court of competent jurisdiction. Immediately suits were brought in the Supreme Court of the State to determine the disposition of these assets. These suits were consolidated and referred to a referee to hear and determine. While the issues were pending and undetermined, the United States government on November 16, 1933, recognized the Soviet government and by that act of recognition every decree made by the Soviet government from the time it was established was retroactively given the force

and effect which must be accorded to the lawful decrees of a legitimate sovereign. Included were the decrees of 1919 and 1920 by which insurance in Russia became a State monopoly; the existence of private insurance companies terminated and their property appropriated. The Soviet government has not itself taken steps to enforce claims against American nationals. All such claims were assigned to the United States government. Cf. *United States v. Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134. Asserting its rights under that assignment, [302] the United States has made claim to all the assets of the Moscow Fire Insurance Company which were deposited with the trust company awaiting the order of a court of competent jurisdiction of this State.

Assignment of the claim of the Soviet government to the United States did not divest the State court of its control of the fund which was deposited with the trust company pursuant to order of the court and which remained subject to its order. The courts of this State continued to exercise exclusive jurisdiction over that fund in the action, then pending, to determine how the fund should be distributed. An independent action brought by the United States in a Federal court against the depository of the fund was dismissed for that reason, and the United States was relegated, for assertion of its claim, to the "appropriate forum where the funds are held." *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 481, 56 S. Ct. 343, 349, 80 L. Ed. 331. Then the United States intervened in this action and now appeals from a judgment on the merits dismissing its claim.

The rights of the United States are derived solely from the assignment by the Soviet government of its claims against nationals of the United States. The claims of the Soviet government for the moneys or property, in this country, of Moscow Fire Insurance Company are based solely on its decrees of nationalization of insurance companies and of seizure of their assets. The United States asserts here title to property of a branch in this State of a Russian insurance corporation which it is said was transferred, by force of these decrees, from the insurance corporation to the Russian government. Two questions arise: first, whether the Russian decrees were intended to have such effect, and, second, whether even if so intended the courts of this State will give them their intended effect.

In considering those questions, some general principles must be accepted as established premises. They are to be found expressed or implicit in the prevailing opinion of this court in *Dougherty v. Equitable Life Assurance Soc. of United States*, 266 N. Y. 71, 193 N. E. 897 and in the opinions of the Supreme Court of the [303] United States in *United States v. Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 and *Guaranty Trust Co. v. United States*, 304 U. S. 126, 58 S. Ct. 785, 82 L. Ed. 1224. Recognition of the Russian government has given to its decrees retroactively the force and effect of foreign law. "The government of Russia is in all respects to be treated as any other power in Europe. * * * Soviet Russia * * * stands in the same position as if the government of Russia had never been interrupted by revolution; its decrees have the same force and effect as if they had been issued by the

imperial government." Per Crane, J., in *Dougherty v. Equitable Life Assurance Soc.*, supra, 266 N. Y. page 84, 193 N. E. page 900. The question then of the construction of the Soviet decrees is a question of the law of Russia to be determined, like other questions of foreign law, upon the testimony of expert witnesses, decisions of the foreign courts or officers authorized to promulgate or authoritatively construe the foreign law, and upon the relevant documents. The question of the effect to be given to the foreign law within this State by the courts of this State must be determined in accordance with the law of this State. Recognized principles of comity and international law or the control of international relations intrusted under the Constitution to the Federal government are factors which at times dictate the content of the law of the State in such matters, but foreign law is of effect here only in so far as the local law gives it effect. It is the established law prevailing in every State under the Constitution of the United States that "the courts of one will not sit in judgment upon the acts of the government of another, done within its own territory," and that "within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision." *United States v. Belmont*, 301 U. S. 324, 327, 331, 57 S. Ct. 758, 759, 761, 81 L. Ed. 1134. Outside of that field the State determines its own public policy and embodies it in its own law.

[304]

Accepting these principles as established now beyond challenge, we apply them to the facts in this case. At the risk of repetition, perhaps needless, we emphasize here that the United States is claiming only as assignee of the Soviet government in the assertion of rights which have no other basis than the Soviet nationalization and confiscation decrees. "There is nothing

* * * to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States * * *

is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."

Guaranty Trust Co. v. United States, 304 U. S. 126, 143, 58 S. Ct. 785, 794, 82 L. Ed.

1224. The United States has not invoked the judicial authority of the States in aid of an agreement it has consummated, calculated to give the decrees of the Soviet government force beyond the force given to decrees of other recognized governments. It invokes the aid of the court only to enforce the rights of the Soviet government, whatever they might be, which the United States has acquired by assignment, to property within this State and subject to the law of the State.

Before recognition, while the courts of this country were not yet subject to the rule imposed by comity between independent sovereign States that "the courts of one [country] will not sit in judgment

upon the acts of * * * another, done within its own territory," there was reluctance, rooted in our age-old common law traditions of ordered liberty, to assume that decrees of the Soviet government which confiscated property without compensation or otherwise exceeded the powers which, in accord with common law principles and traditions, a sovereign might *properly* exercise, should, after recognition, be treated in full sense as "law" even within Russia. Whether doubts, then expressed, or [305] limitations, suggested in advance, upon the effect which the courts here would give to such decrees of the Soviet, were well founded, need not now be considered. After recognition, the court in *Dougherty v. Equitable Life Assurance Society of United States*, supra, held that *wherever Russian law governs* the rights and obligations of insurance companies, there the courts of this State will give full effect to the decrees of monopolization and nationalization of insurance and insurance companies in Russia. It applied the rules of Russian law in the performance of obligations owed to persons not citizens of the United States by a Russian corporation under a contract made in Russia, to be performed primarily in Russia and by agreement of the parties to be governed by the law of Russia. The opinion indicated in clearest language that what was there said and decided was limited to rights "*dependent upon the law of Russia*," analogous to "right to tangible property in Russia or the possession thereof" (page 88, 193 N. E. page 902). Nothing said indicates that rights to property in New York belonging to the United States branch of a Russian insurance company *are* dependent upon the

law of Russia as formulated in the Soviet decrees. That is the problem presented here.

The United States relies primarily upon three decrees. They are described in the findings of the referee as follows:

"88. The decree of November 18, 1919, on the annulment of life insurance contracts abolished insurance of life in all its forms in the Republic and annulled all contracts with insurance companies and savings banks with respect to the insurance of life, capital and income.

"89. The decree of the Soviet of People's Commissars dated March 4, 1919, on the liquidation of obligations of State enterprises, provided that stock certificates and shares of joint stock companies, whose enterprises have been either nationalized or sequestered, are annulled and also provided that such enterprises are free from the payment of all debts to private persons and enterprises which have arisen prior to the nationalization of these enterprises, including payments on bond loans with the exception only of wages due to workers and employees.

[306] "90. The decree of the Soviet of People's Commissars dated June 28, 1918, provides in Article I that the commercial and industrial enterprises enumerated therein, which are located within the boundaries of the Soviet Republic, together with all their capital and property, regardless of what the latter may consist, are declared the property of the Republic."

The opinion of an expert witness on the law of Soviet Russia and interpretative decrees or declarations of Soviet boards or officers, supports the contention of the United States that these decrees were intended to

apply to the business of Russian insurance companies not only inside Russia but also without Russia, and to transfer to the Russian government all the property of the insurance companies as the "indivisible property of the indivisible juristic persons." In spite of such testimony the referee has found that the decrees were not intended to apply to the property in this State of the United States branch of Moscow Fire Insurance Company.

Opinions of expert witnesses will not control the judgment of a judge in regard to foreign law "except to the extent that it is a reasonable inference from statute or from precedent or from the implications of a legal concept, such as contract or testament or juristic personality. (Citing cases.) Unless it is this, the judge must use his own judgment and find the meaning of the foreign law as he would if the meaning to be ascertained were that of a deed or an agreement. This is as true upon appeal as it is upon a trial. At such times and for such inquiries, opinion has a significance proportioned to the sources that sustain it." *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N. Y. 23, 34, 170 N. E. 479, 483, opinion by Cardozo, Ch. J., cited with approval in *Dougherty v. Equitable Life Assurance Society of United States*, *supra*. Tested by that standard the findings of the referee are fully sustained by the evidence even though no expert witness was produced by the respondents to guide the judgment of the referee.

In a long series of decisions the courts of England have held that decrees by the Soviet government nationalizing [307] the business of banking or insurance, canceling

obligations of banking and insurance companies and confiscating their property were not intended to apply to property of the companies with situs outside of Russia, or to obligations to be performed outside of Russia. *Matter of Russian Bank for Foreign Trade*, [1933] Ch. Div. 745; *Russian Commercial & Industrial Bank v. Comptoir D'Escompte De Mulhouse*, [1925] A. C. 112; *First Russian Ins. Co. v. London & Lancashire Ins. Co.*, [1928] Ch. Div. 922; *Luther v. Sagor*, [1921] 3 K. B. 532. Even if so intended they would not in England be given such effect though the Soviet government was recognized and its decrees were part of the law of Russia. *Sedgwick, Collins & Co. v. Russia Ins. Co. of Petrograd*, [1926] 1 K. B. 1; *Employers' Liability Assur. Corp. v. Sedgwick, Collins & Co.*, [1927] A. C. 95. It is pointed out in the opinion in *Matter of Russian Bank for Foreign Trade*, supra, that the Russian Soviet government in 1922 and 1923 in official circulars and regulations itself gave similar interpretation to such decrees. It also appears from the same opinion in the English case that the courts of France gave similar limited extraterritorial effect to such decrees.

There is no need here to consider whether in general Soviet confiscatory decrees are intended to apply to property with situs in this State, or whether, if so intended, the courts of this State would give the decrees such effect. Such questions are left open by the opinion in *Dougherty v. Equitable Life Assurance Society of United States*, supra, and the doubts there expressed or implied are not to be either confirmed or removed until the questions are more clearly presented. We deal here with a class of

property and a juristic person sui generis. Certainly no decree monopolizing the business of insurance in Russia; taking over the conduct of the insurance business formerly conducted in Russia by insurance corporations, and terminating the obligations of such companies could possibly have been intended to apply to business conducted here, or if so intended, could be binding here. This State by its own laws determines what organi[308]zations shall be permitted to conduct the business of insurance here, what capital or security shall be required and in other respects how such business shall be conducted. Certainly no foreign government may decree that it will take over the business here conducted by a corporation approved by this State, and cancel or change obligations to be performed here by such corporations.

No contention so opposed both to common sense and generally accepted juristic concepts is strongly urged here; but we are told that after capital of the corporation here has been applied in satisfaction of claims of creditors and policyholders here, the decrees do operate to confiscate and transfer to the government the surplus capital. There is nothing in the decrees to indicate that though the Russian government could not take unto itself the business of insurance conducted by Russian corporations here, yet the Russian Soviet government did intend to take unto itself the property of the company here. The property which the United States government claims is what remains of the capital which this State required the insurance company to deposit here with the Insurance Department or with trustees. It is the property which at all times has been within the State of New York. As the

referee has found, it "has always been held by and the legal title thereto vested in trustees resident in and citizens of the United States." It has always been subject to the control of the Insurance Department and in a practical sense has always been in the custody of the State. At no time could the insurance company or the Russian government have transferred it to Russia. In strongest sense its situs was in this State, and the control of this State complete. No juristic fiction that the situs of intangible property is the domicile of the owner could overthrow those facts. Over such property it is clear that the Russian government, either Imperial or Soviet, had no power of control, and as the referee properly found, asserted no power of control. In *Dougherty v. Equitable Life Assurance Society of United States*, supra, the court, as we have said, was dealing with obligations dependent upon Russian law. In *United States v. Belmont*, supra, the court was considering the sufficiency of pleadings which conclusively established that the United States was asserting, under assignment from the Soviet government, a claim to intangible property here of a Russian corporation which under Soviet decree had been confiscated by the government. See opinion of Circuit Court of Appeals, 2 Cir., 85 F. 2d 542. The allegations in the complaint that under the decree the property of the corporation was confiscated by the Russian government and then transferred to the American government was admitted by demurrer, and as the court pointed out, were not open to challenge. Such cases in no wise support the appellant's contention here, where we are considering whether title to property in the custody of this State

has been transferred in invitum from its owner to the Soviet government or is "dependent" upon the law of Russia.

Even if, as the expert witness testified, the decrees were intended to apply to the "indivisible" property of the "indivisible juristic persons," the property of the United States branch of a Russian insurance company must fall outside the scope of a decree so defined. The Insurance Law requires that before a foreign insurance corporation is permitted to do business here there must be a definite separation and division of its property and even of its juristic personality. "The Insurance Law, as now written, and as an entirety, indicates a purpose and policy in dealing with foreign insurance companies doing business in this country which are so definite and plain that they fix upon the words under consideration an interpretation which cannot fairly be avoided. We think that the Legislature in allowing these foreign companies to do business in this state and country intended to treat the domestic agency largely as a *complete and separate organization*; to place it on a parity with domestic corporations; to supervise and regulate it as such; and to require it by the deposit of prescribed assets to *set up within this country a capital corresponding to that of domestic corporations*, and which should be security for business transacted by it here and not elsewhere." *Matter of [310] People by Stoddard, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 158, 151 N. E. 159, 162. [Italics are new] Thus the property of the United States branch of a foreign insurance company acquires a character of its own. That character is "dependent" upon the law of

this State. The property from its nature is subject to the laws of this State, and both the property and the "complete and separate organization" analogous to a domestic corporation are immune from the control of any foreign power. No rule of comity and no act of the United States government constrains this State to abandon any part of its control or to share it with a foreign State. The findings or conclusions of the courts below that the decrees of nationalization of insurance were not intended to have effect here and that title to and right to possession of the capital of the United States branch of the insurance company is dependent upon the law of this State, rest upon a firm foundation.

Difficulty still remains, however, in determining the persons or corporations who may share, under the *law of this State*, in the distribution of the assets of the United States branch of Moscow Fire Insurance Company, regarded as a "complete and separate organization" created and regulated by the law of this State. Upon liquidation that separate organization ceased to exist and the parent corporation was not authorized to transact business here. When those who had done business with the United States branch as a separate and complete organization had been paid out of its capital here there was no longer any reason why the State, acting through the Superintendent of Insurance, should retain its control or custody of the assets here. The parent corporation at its domicile or a domiciliary administrator of the corporation would ordinarily be entitled to its property, and creditors or stockholders might, in accordance with the law of the

domicile, present their claims there. Though the Soviet decrees upon which the appellant relies have no extraterritorial effect upon property or corporate branch located here, in Russia the decrees have effected the death of the parent company. *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] App. [311] Cas. 289. The corporation cannot make any claim for itself or for its stockholders or its unpaid creditors residing in Russia or elsewhere than in the United States, and there is no domiciliary administrator who might distribute the assets among such creditors or stockholders. That is why this court has ordered distribution here. Except for the belated claim asserted by the United States after it recognized the Soviet government, upon the death of the parent corporation, property of its branch would now be distributed here among stockholders and creditors in accordance with the judgment entered upon the report of the referee. Has the United States by assignment from the Soviet government acquired a claim superior to these foreign creditors or stockholders?

It was said by Viscount CAVE in *Russian Commercial & Industrial Bank v. Comptoir D'Escompte De Mulhouse* that "it is not an agreeable task for a British Court of Justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign State of the assets of private persons 'on the basis of complete confiscation.'" It is no more agreeable to an American court which administers law based on the same principles and traditions of the common law. None the less the courts of both countries have, after recognition of the Soviet

Republic, given to such decrees the force and effect to which they are entitled as part of the law of Russia. But no principle or authority has been cited which should constrain or, perhaps it should be said, would justify the courts of New York in abandoning control of property situated here in the custody of this State, or in subjecting to Russian law rights to such property which are governed by the law of this jurisdiction. Though we may not "sit in judgment upon the acts of the government of another, done within its own territory;" though this State may not choose between different policies where no choice is left open to us under established rules of law, yet where there is room for choice we are guided by common law principles and traditions embodied in our Constitution, statutes and [312] judicial decisions. To meet conditions for which there was no precedent and for which no provision was made in the statute, this court, as we have said, devised an extraordinary method of administering and distributing the assets in the possession of the State, which we hoped would "conform to the exactions of justice and equity." We have invited creditors and stockholders to prove their claims, and now we are told that the method which in 1931 conformed to the exactions of justice and equity must be rejected because retroactively it has become unlawful; that the suitors who at our invitation have come into court must be dismissed empty-handed; that we must remit the assets in our control to another sovereign to retain or distribute as it sees fit. No principle of law constrains us to do that.

Juridical concepts may be important factors in determining legal rights and obligations when concepts and obligation are parts of a consistent system of jurisprudence. The corporate "fiction" of a single artificial juristic person cannot be applied with unrelenting logic where one sovereign endows the corporation with life and another sovereign permits a branch of the corporation to do business only as a "complete and separate organization." Theories underlying our concept of private property and private rights and obligations are of doubtful validity when, attempting to reconcile what is basically inconsistent, the courts must determine the effect, upon private rights in property situated here, of decrees which elsewhere have destroyed private rights of property and contracts. Perhaps argument might be made that the claims of all persons not our own nationals and not arising through transactions with the United States branch of a Russian insurance company, though under our law untouched by the Soviet decrees until the United States recognized the Soviet government, are under our law retroactively destroyed by such decrees after recognition. No such question is before us. The United States can challenge the claims of those to whom the property has been awarded only if it has a valid claim [313] to the property of the insurance company in the United States. We review the validity of the claim of the United States; defects in the claim of others would not cure invalidity there.

Because the legal title and right of control of the property which the United States is claiming as assignee of the Soviet Re-

public has at all times been in the State or in a trustee subject to the direction of the State, its situs was here and it has been subject exclusively to the laws of the State. Because the United States branch has been under the law of this State a "complete and separate organization" and its assets have constituted "a capital corresponding to that of domestic corporations," the Soviet government's decrees did not automatically terminate the existence of the United States branch or alter the right of the State to control and administer the property according to its own law. At least until recognition of the Soviet government the right of this State to liquidate the capital of the United States branches of Russian insurance companies according to New York law, and to distribute the assets among those who under New York law were its creditors or stockholders, was not open to challenge. The Supreme Court of this State had taken the property into its own custody to make such distribution long before recognition. It had invited claimants to prove their claims. After recognition, the courts of this State were bound to take notice that the parent corporation was legally dead. They had already taken notice that the parent corporation could no longer function. The proceeding for distribution proceeded as before. The law of its domicile ordinarily determines the manner in which property of a corporation is to be distributed, but that rule does not apply invariably. The incidents of ownership of property, especially immovable property, are dependent upon the law of their situs. The property claimed here was in all respects subject to the law of this State.

Though the courts of this State are bound to give effect to the decrees of the Soviet government insofar as these decrees terminated the existence of the company in Russia, they might still proceed with the liquidation of [314] the property in their custody here, treating the United States branch, the creation of the Insurance Law, as a complete and separate organization, as such branches had always for many purposes been treated. As long as the parent company existed it would under the law of this State have certain residual rights in the property of the branch after the branch was liquidated. Those rights arose out of the relationship of parent corporation and branch. The extinction of the parent company by the decrees of the Soviet government has eliminated the parent company and destroyed that relationship. A new situation has arisen which must be met in accordance with the law of this State. The courts, giving effect as they must to the extinction of the parent company, must determine whether the parent company's residual right to property here passes by confiscatory decree to the sovereign who extinguished the parent corporation or whether under the law of this State such rights have passed to the stockholders and foreign creditors who, in answer to an invitation extended to them by this State, have come in and proven their claims in accordance with a procedure devised by this court to "conform to justice and equity" as those terms are understood here. The courts below have made the proper choice, not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy, but because under the law

of this State such confiscatory decrees do not affect the property claimed here.

The judgment should be affirmed, with costs.

RIPPEY, Judge (dissenting).

On March 16, 1917, the Imperial government of Russia was overthrown. On that date the Provisional government of Russia was set up and on March 22, 1917, the Provisional government of Russia was recognized by the United States. On July fifth of that year Boris Bakhmeteff was recognized by the President of the United States as the Ambassador from the Provisional Government and Serge Ughet as financial attaché of the Russian Embassy in the United States. The Union of Soviet Socialist Republics, known and referred to as the [315] Soviet government, superseded the Provisional government on November 7, 1917. Thereupon the Soviet government dismissed Bakhmeteff as Ambassador, but the United States continued to recognize him to June 30, 1922, and the financial attaché down to November 16, 1933. To recover any property of the Imperial, Provisional or Soviet governments held in our country by our nationals, his status was such that he might have brought suit at any time after July 5, 1917, and prior to November 16, 1933. *Guaranty Trust Co. v. United States*, 304 U. S. 126, 58 S. Ct. 785, 82 L. Ed. 1224. Full recognition was granted by the United States government to the Soviet government on November 16, 1933, and, by that act, every act of the Soviet government prior to recognition was validated. *United States v. Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134. Recognition being an accomplished fact,

every pertinent act of the Soviet government from the beginning must be given full force. *Dougherty v. Equitable Life Assurance Soc. of United States*, 266 N. Y. 71, 193 N. E. 897.

Decrees, laws, enactments, and orders of the Soviet government, promulgated during the years 1918 and 1919, expressly or by implication, both as matter of fact and matter of law, and as understood and construed by that government, (1) nationalized and monopolized the business of insurance in all its forms whereby all Russian insurance companies were dissolved, terminated and liquidated, and their assets, including the assets of all their branches and subsidiaries, in whatever form and wherever located and in whatever manner and wherever held, were confiscated and forthwith became the property of the Soviet government, (2) repudiated, canceled, annulled and discharged all debts of those companies, their branches and subsidiaries, to whomsoever and wherever owing, (3) extinguished all rights of their shareholders, and (4) discharged all obligations and liabilities of the companies. The result was that the Soviet government became the owner and entitled to the immediate possession of all property of the nationalized companies and of their branches and subsidiaries, wherever physically located, as of the date of nationalization. The [316] property of the Moscow Fire Insurance Company, of Moscow, Russia, wherever physically situate, with all its subsequent accretions, then became the property of the Soviet government, free from all claims of creditors, policyholders or stockholders, except as nationals of the country where such property was physically located

might be permitted by the public policy of that country or by its own and international law to assert their claims. Such conclusions, it seems to me, are unassailable, both in fact and in law, as I shall presently more fully point out. International comity and expediency bar assertion to the contrary in any court of the United States. *United States v. President and Directors of Manhattan Co.*, 276 N. Y. 396, 12 N. E. 2d 518; *United States v. Belmont*, supra; *Shapleigh v. Mier*, 299 U. S. 468, 471, 57 S. Ct. 261, 81 L. Ed. 355, 113 A. L. R. 253.

The Moscow Fire Insurance Company, of Moscow, Russia, was organized under the laws of the Empire of Russia in 1858 and was admitted to do business within the State of New York in 1899. It organized a United States branch and deposited from its own property in Russia (not originating from contributors or shareholders within the United States) security expressly for the protection only of domestic creditors and policyholders as required by section 27 of the Insurance Law (Consol. Laws, c. 28) of the State of New York. That deposit remained the property of the parent company, subject only to the claims of domestic creditors. *Matter of People, by Stoddard, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 151 N. E. 159. Thereupon the Superintendent of Insurance issued a license to the branch to transact business here. Upon keeping the deposit good the license was renewed from year to year thereafter until 1925. On August 8, 1925, pursuant to the provisions of the Insurance Law, the Superintendent of Insurance was appointed liquidator of the local branch. During the progress of the liquidation the claims of

all domestic creditors and of all policyholders through the local branch and of all foreign creditors who had attachments when the Superintendent took possession were paid in full and the question arose as to what disposition should be made of the cash and securities, [317] aggregating \$1,080,399.54, remaining in his possession, legal title to which was then vested in the Soviet government as the successor of the insurance company. He was finally directed to turn the money and securities over to the surviving director of the parent company and/or to the Bank of New York and Trust Company as depositary subject to the order of a court of competent jurisdiction (*People, by Beha, Moscow Fire Ins. Co. of Moscow, Russia*, 255 N. Y. 433, 175 N. E. 120; *People, by Beha*, 262 N. Y. 453, 188 N. E. 17; cf. *United States v. President and Directors of Manhattan Co.*, supra, page 401, 12 N. E. 2d 518), which he did on April 18, 1933. Thereupon these actions were commenced by creditors and by stockholders of the parent company, none of whom were our nationals. After consolidation of the actions and trial of the issues therein raised, a judgment of distribution was entered by the Supreme Court on August 18, 1934, and subsequently affirmed by the Appellate Division.

The record in that proceeding establishes that the claimants to whom distribution was directed to be made (with the possible exception of three) were all variously residents and citizens of Latvia, Norway, Sweden, Russia, Estonia, Poland, Germany and France, having claims arising variously out of agency contracts and insurance and reinsurance contracts written and to be per-

formed in countries other than the United States, ownership in shares of the parent company and services rendered by attorneys and others to the parent company and to the liquidating director of the Moscow company in foreign countries. None of the claims of foreign creditors or shareholders arose out of relations with the local branch and adjudication followed our law, not Soviet law, the law of the domicile of the owner of the fund. The validity of those claims depended on the laws of the Imperial government of Russia and its successors (*Dougherty v. Equitable Life Assurance Soc. of United States*, *supra*; *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 537, 3 S. Ct. 363, 27 L. Ed. 1020), or upon the laws of the countries of the citizenship of the claimants or where the claims arose. *Severnec Securities Corp. v. London & Lancashire Ins. Co.*, 255 N. Y. 120, 174 N. E. 299. Said the Supreme Court in the *Gebhard* case, *supra* (109 U. S. 527, 3 S. Ct. 370): "Such being the law, it follows that every person who deals with a foreign [318] corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclu-

sively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. *It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.*" [Emphasis mine.]

The Moscow Fire Insurance Company existed "only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person." *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U. S. 120, 124, 58 S. Ct. 125, 127, 82 L. Ed. 147. As the corporation went so went its local branch. Though dead, the parent survived, this court has held, as to its property in this State in the sense that its surviving director might possess its assets with situs here, after satisfaction of the claims of our nationals. *People, by Beha*, 255 N. Y. 433, 175 N. E. 120.

No amount of argument can change the fact that there is no foundation in our statute law, in the decisions of our courts, in reason, logic or elsewhere for the assertion that the branch of a foreign corporation is a juristic, legal or factual entity, separate and distinct from the parent company, or that it may be placed in the same position as a domestic corporation as to rights and obligations and capable independently to perform corporate functions. The con[319]trary has been held in this State as a necessary basis for the decision

in *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 146 N. E. 369, 37 A. L. R. 720, in the instant case where this court ordered deposit of the fund with the surviving director of the parent company (People, by Beha, 255 N. Y. 433, 175 N. E. 120), and in other cases involving Russian corporations where similar orders and decisions were made. Nothing to the contrary was held by this court in *Matter of People by Stoddard, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 159, 151 N. E. 159, 162. No such broad rule as is claimed here was there laid down nor was there occasion for it. Whatever was said there was limited to the question as to whether assets of an insolvent foreign insurance company located in this country should be applied, if necessary, to satisfaction of claims of policyholders who were residents of the United States, not alone when these policies were written here but when such policies were written abroad, and it was held that the deposit required by the statute "*should be security for business transacted by it here and not elsewhere.*" [Emphasis mine.] The decision is authority for the proposition which we are now asserting that beyond our own nationals whose claims originated here or those who had liens on the fund prior to the time the Superintendent of Insurance took possession, the control or authority of our courts is limited to turn over the surplus, under proper safeguards, to the parent corporation, its successor or its representative, in the foreign jurisdiction. This rule was again definitely emphasized in *James & Co. v. Rossia Ins. Co. of America*, 247 N. Y. 262, 160 N. E. 364 and in *Matter of People by Stoddard, Norske Lloyd Ins.*

Co., 249 N. Y. 139, 163 N. E. 129, where the subject of interest on claims against the same company was under consideration, and Judge Lehman said (pages 145, 146, 163 N. E. page 130): "Other creditors, including American citizens, may share only in the distribution of assets of the foreign liquidators, appointed in the jurisdiction where the corporation is domiciled, to whom the superintendent of insurance must transmit any surplus of the funds in his charge, remaining after the payment of those creditors who are entitled to payment therefrom. *Matter of People, City Equitable Fire Ins. Co., Limited of London, England*, 238 [320] N. Y. 147, 144 N. E. 484." That we may not distribute the surplus to foreign claimants in our courts, in the absence of liens or attachments by foreign claimants, was most emphatically emphasized in *Matter of People, by Beka v. Russian Reinsurance Co.*, 255 N. Y. 415, 175 N. E. 114, since there was no insolvency and the corporation, though legally dead at its domicile, was still a "juristic" person for whom its directors were empowered to act. See, also, *Matter of People, by Beka, Second Russian Ins. Co.*, 256 N. Y. 177, 181, 176 N. E. 133, 134, where this court, citing the case reported in *People by Stoddard, In re Norske Lloyd Ins. Co.*, 242 N. Y. 148, 151 N. E. 159 said: "As the claim originated in an alien country, through a contract between aliens, it was a foreign claim, not entitled to a share in the distribution made by the superintendent of insurance, from the funds received by him." No emergency or occasion now arises for the definition of a "branch" of a foreign company such as has been suggested. To avoid the clear mean-

ing of the statutes and the direct, implicit and constant holdings of this court amounts to writing into the statute something that does not now exist and it is beyond our province or power to do so. The successor of the parent company could sue here, the fiscal agent of its successor, the Soviet government, to the time of the assignment could have enforced its claims (*Guaranty Trust Co. v. United States*, supra) and, though dead in its domicile, its surviving director, though an exile from Russia and a nonresident here, so this court has held, can take control of its property here, not because it belongs to its local branch as a separate domestic corporation or as a *separate entity*, but because it still belongs to the parent corporation, a "juristic" person, itself. The branch was independent of the parent company, so far as here material, only to the extent that the statute requires that our jurisdiction shall not be limited so as to hamper our courts in extending, out of its assets in this country, "the protection of all its policyholders and creditors within the United States." Insurance Law, § 27.

There can be no question of the powers of the Soviet government to take the course it pursued or to put into [321] effect the result indicated, either before or after recognition by our government, within its own territory and, under Russian law, Russian creditors, policyholders and shareholders have redress only against the State. See *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 537, 3 S. Ct. 363, 27 L. Ed. 1020. Neither can there be any question of the necessary result of the laws, enactments and orders of the Soviet government as affecting property extraterritorially ex-

cept insofar as the public policy of the place of the location of that property may interfere. By force of the Soviet law, its authority is binding in the United States. *Canada Southern Ry. Co. v. Gebhard*, supra. We have no domestic policy that may interfere with the effect of its nationalization and confiscation decrees on its relations with foreign creditors and shareholders or on contracts of the nationalized corporation neither made nor to be performed within this country. Wrong to the claimants, if there be any wrong, was done by the Soviet government. As to disputes between nationals of countries other than our own and a foreign country we have no concern. In *United States v. Dickelman*, 92 U. S. 520, 524, 23 L. Ed. 742, it is said: "A citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy or, if need be, by war. It rests with the sovereign against whom the demand is made, to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself."

At the time of the diplomatic recognition by the United States of the Soviet government and as a part of the diplomatic exchange between the two governments, an assignment was made to the United States

of all interest which the Soviet government had in the fund in question. *Prima* [322] *facie*, the United States thereby became entitled to the whole fund. *United States v. President and Directors of Manhattan Co.*, supra. In the *Belmont case*, supra, 301 U. S., page 332, 57 S. Ct., page 761, 81 L. Ed. 1134, in language equally applicable here, the Supreme Court said: "The substantive right to the moneys, as now disclosed, became vested in the Soviet government as the successor to the corporation; and this right that government has passed to the United States." The purpose of the documents exchanged at the time of recognition was to protect and promote the interests of the United States and of its nationals. The assignment, by its own terms, was "preparatory to a final settlement of the claims and counterclaims between the governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals." The assignment is broad and is conclusive on its face. If the purpose and effect of the assignment, read in the light of diplomatic exchanges and recognition of the United States, was not to transfer title to the fund in question and to all other claims against our nationals which the Soviet government might have, it was all an idle ceremony. Its validity, scope and purpose are matters with which the executive branch of our government and of the Soviet government only are concerned and may not be questioned nor its purpose frustrated by the courts. *United States v. Belmont*, supra. For the purpose of our courts the Soviet government became vested with legal title to the entire fund and to all its accretions at the time of the

nationalization and confiscation decrees free and clear of any claims of creditors (other than our own nationals) against the same and continued to have such interest to the time of the assignment to the United States. Nothing occurred to change the status or the title or ownership to the fund until the assignment whereby the United States succeeded to the rights of the Soviet government.

After unsuccessfully attempting to invoke the jurisdiction of the Federal courts in its effort to procure the fund, which efforts culminated at or about the date of entry of the judgment in the consolidated actions, the United States [323] forthwith filed a petition to intervene in the State court actions. It asserted it had a valid claim to the entire fund in the hands of the depository as of the date of acceptance by the latter of the trust, together with all subsequent accretions. Having rightfully intervened and having duly and legally acquired title to the fund, it was entitled to have determined every question that could properly be raised and to contest the right of claimants to sue in our courts and the validity of the claim of each party to the consolidated actions on the merits, if necessary, and to assert such defenses thereto as were open to it in the local forum under either the local law or the Soviet law. Cf. *Guaranty Trust Co. v. United States*, supra. It was not bound or prejudiced by any action taken by any of the parties to the consolidated actions or by any decision made by the courts therein prior to intervention, since neither it nor its claim was before the court prior to that time. The United States government has never had an

opportunity to litigate those claims. *Upon a contest by an interested litigant* it might be shown that none of the claims can be maintained in our courts. Such claimants might be found to be without such a standing as would permit them to contest the claim of the intervener. After the United States intervened the only issue tried or determined in the trial court was whether appellant had a right to intervene and contest the claims of respondents. Decision of that question against appellant was based on findings that the United States acquired no right or title whatsoever to the fund in question by the assignment because the Soviet government had no title to give, but that, even though it acquired thereby some interest, the public policy of the State of New York forbade its recognition.

Of course, the Soviet government neither could (*United States v. Buford*, 3 Pet. (U. S.) 12, 7 L. Ed. 585) nor presumed to transfer greater title or a more extensive interest in the fund than it had to give. What it acquired by the nationalization decrees or what limitations may be placed by the confiscation decrees on claims of creditors of the nationalized company must be determined exclusively by the Soviet law. I have indicated that, in my opinion, the scope and effect of the decrees are not open for consideration as a question of fact in our courts. If otherwise, the result is not changed. What was the applicable Soviet law and the intent and scope of the decrees in question was decided by the referee as a question of fact based upon an examination of various documents introduced in evidence and upon the oral testimony of an expert whose opinion he saw fit to disregard.

Where written laws or judicial opinions of foreign courts are involved, the question of construction, if open, is one of law for the court, but where the construction of unwritten laws is involved, what is the law becomes a question of fact. *Genet v. President, etc., of Delaware & H. Canal Co.*, 163 N. Y. 173, 57 N. E. 297; *Bank of China, Japan & The Straits v. Morse*, 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676; *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127, 169 N. E. 112, 68 A. L. R. 801. The referee erroneously decided that the purpose, intent and scope of the decrees did not affect or embrace the property here in question. I find no evidence whatever in the record to sustain his conclusion. If open to construction, the decrees are to be construed in the manner they are understood and applied by the Soviet government. There is no dispute in the record as to how they have been construed and applied by that government. The testimony of the government expert, the various relevant documents and the decisions of Soviet officials authorized to construe and to promulgate and enforce rules and regulations thereon establish without contradiction that the intent, scope, purpose and effect of the Soviet decrees was to embrace within their coverage the property of the Moscow Fire Insurance Company physically located within the United States. There was no evidence to the contrary. As matter of law we must so hold. We are not concerned with the validity of the assignment, for that is a political, not a judicial, question.

No one disputes the fact that our State courts have control over the surplus fund and power to order its distribution. *United*

States v. Bank of New York & Trust Co., [325] 296 U. S. 463, 56 S. Ct. 343, 80 L. Ed. 331. That control extends only to its preservation for its rightful owner and the power to distribute extends only to distribution to those rightfully entitled there-to according to law. We have no power to distribute it according to our notions of the equities which, however camouflaged, must of necessity be based on a lingering policy of nonapproval and nonrecognition of the nationalization and confiscation decrees of the Soviet government from which, even now, we hesitate to depart. On no other theory can distribution be ordered here to claimants other than our own nationals or to the intervener. Still, we have said that, however thoroughly convinced in the righteousness and justice of our public policy against nationalization and confiscation of private property we may be, our feelings in the matter must not dictate our judgment (*Dougherty* and *Manhattan* cases, *supra*, and the Supreme Court, in the *Belmont* case, has added the controlling weight of its authority by asserting that "no state policy can prevail against the international compact here involved" (301 U. S. page 327, 57 S. Ct. page 759, 81 L. Ed. 1134).

The judgment appealed from and the judgment of the Special Term should be reversed and the matter remitted to the Special Term to proceed in accordance with this opinion, with costs to appellant against respondent claimants in all courts.

O'BRIEN, HUBBS, and LOUGHRAN, JJ., concur with LEHMAN, J.

RIPPEY, J., dissents in opinion, in which CRANE, C. J., and FINCH, J., concur.

Judgments affirmed.

APPENDIX B

Section 27 of the Insurance Law of New York
(Consol. Laws, ch. 28):

Funds and capital within the United States of corporations organized outside of the United States, transacting in this state the business of fire or marine insurance.—

1. No insurance corporation organized and existing under the government or laws of any state or country outside of the United States, hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state, shall transact such business therein unless it shall have securities or other property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees, as hereinafter provided, for the protection of all its policyholders and creditors within the United States, as follows: (a) If authorized to transact the business of fire insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and three hundred thousand dollars deposited with insurance departments or state officers or so held in trust; (b), if authorized to transact the business of marine insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and one hundred thousand dollars deposited with insurance departments or state officers or so held in trust; or (c) if authorized to transact the business of both fire and marine insurance,

four hundred thousand dollars deposited with the superintendent of insurance of this state and four hundred thousand dollars deposited with insurance departments or state officers or so held in trust.

2. For all purposes specified in this chapter, the capital of such a foreign insurance corporation now or hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state shall be the aggregate value of all securities and other property within the United States deposited with insurance departments or state officers and held in trust by a trustee or trustees for the protection of all its policyholders within the United States, or all its policyholders and creditors within the United States, after taking from such aggregate value the same deductions for losses, debts and liabilities in the United States and for unearned premiums on risks therein not yet expired as are authorized or required by the laws of this state or the regulations of the superintendent of insurance with respect to domestic insurance corporations transacting the same kind or kinds of business. In addition to the reports required by law of such a foreign insurance corporation, it shall, not later than the fifteenth day of February in each year, file in the office of the superintendent of insurance a detailed statement, as of the thirty-first day of December next preceding, of the items making up such securities and other property so deposited and held in trust by a trustee or trustees and of the deductions to be made therefrom, signed and verified by the United States manager or attorney of such corporation, the items of the securities and other property held

under trust deeds to be certified to by the trustee or trustees; provided that the superintendent may also at any time require a further statement of the same kind and of such date as he may determine. The superintendent of insurance shall, on the filing of such annual statement, or from such examination as he may make of the affairs of such corporation, determine the amount of such capital as of the thirty-first day of December next preceding, and issue to such corporation his certificate of the amount of its capital as so determined; and, if it shall at any time appear that the capital for which the last certificate shall be outstanding has been materially reduced, the superintendent shall issue to such corporation a new certificate stating the amount of such reduced capital; provided that the capital so ascertained is not reduced below the sum of two hundred thousand dollars for a corporation authorized to transact the business of fire or marine insurance only, or four hundred thousand dollars for a corporation authorized to transact the business of both fire and marine insurance.

3. Whenever it appears to the superintendent, from any statement made to him or from an examination made by him or by an examiner appointed by him, that the capital of such a foreign insurance corporation is reduced below the sum of two hundred thousand dollars for a corporation authorized to transact the business of fire or marine insurance only, or of four hundred thousand dollars for a corporation authorized to transact the business of both fire and marine insurance, or that its assets are insufficient to justify its continuance in business, he shall determine the amount of

such impairment or deficiency and issue a written requisition to such corporation, through its United States manager or attorney, to make good the amount of such impairment or deficiency within such period as he may designate, not less than thirty nor more than ninety days from the service of the requisition.

4. That part of the capital of such a foreign insurance corporation required to be deposited with insurance departments or state officers shall be invested and kept invested as is required by the laws of the states where such deposits are made with regard to deposits by insurance corporations organized under the laws of a foreign country. The funds of such a foreign insurance corporation, other than its deposits, may be invested in such securities or other property as may be acquired and held by a domestic insurance corporation transacting the same kind or kinds of business.

5. When any part of the securities or other property of such a foreign insurance corporation is held by a trustee or trustees, such trustee or trustees shall be appointed by the board of managers or directors of such corporation, and a duly certified copy of the vote or resolution creating the trust shall, with a duplicate original of the deed of trust, approved by the superintendent of insurance, be filed in the office of such superintendent. The trustees or trustee shall be either three or more citizens of the United States or a trust company authorized to execute trusts in a state where such corporation has applied for authority or been authorized to do business, and must be approved by the superintendent of insurance. Such super-

intendent may examine such trustee or trustees, and the securities or property of such trust, and any books or papers affecting the same, in the same manner as he is authorized by this chapter to examine the affairs or funds of a domestic insurance corporation.

6. The superintendent of insurance may also receive for deposit from such a foreign insurance corporation securities or property in addition to the minimum deposit required by subdivision one of this section; but no such additional deposit now held by him or hereafter made with him shall be surrendered to such foreign insurance corporation unless the corporation's deposit with the superintendent of insurance after such surrender shall, at their market values, be at least equal to the deposit required to be made with him by subdivision one hereof. In case the deposit requirement of any state in which such foreign insurance corporation shall at the time be transacting business is greater than the minimum deposit herein provided, the additional deposit shall not be surrendered except upon the written consent of the insurance supervising official of such state.

7. Such a foreign insurance corporation now or hereafter authorized to transact the business of fire insurance in this state may also be authorized to transact the business of marine insurance when and in case it has complied with subdivision one of this section. Such a foreign insurance corporation now or hereafter authorized to transact the business of marine insurance in this state may also be authorized to transact the business of fire insurance when and in case it has complied with subdivision

one of this section. Separate statements of the fire and marine business transacted by such a foreign insurance corporation shall no longer be required or permitted. (Added by L. 1919, ch. 382, December 31.)

Section 63 of the Insurance Law of New York (Consol. Laws, ch. 28):

Proceedings against and liquidation of delinquent insurance corporations.—This section shall apply to all corporations, associations, societies, and orders to which any article of this chapter is applicable, and to all corporations, associations, societies, and orders which are subject to examination under any section of this chapter, or which are doing or attempting to do or representing that they are doing the business of insurance in this state, or which are in process of organization intending to do such business therein, anything as to any such corporations, associations, societies or orders provided in this article to the contrary notwithstanding; and the words "corporation" or "corporations" herein shall also include all such associations, societies, and orders as well as all voluntary or unincorporated associations.

1. Whenever any domestic corporation (a) is insolvent; or (b) has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the superintendent, or his deputy or examiner; or (c) has neglected or refused to observe an order of the superintendent to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock corporation, or its reserve, if it be a mutual corporation, shall have become impaired; or (d) has, by contract of reinsur-

ance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, association, society or order, without having first obtained the written approval of the superintendent; or (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or (f) has wilfully violated its charter or any law of the state; or (g) whenever any officer thereof has refused to be examined under oath touching its affairs; or (h) if such corporation be organized under article five-a, six, seven, eight, ten-a, or ten-b of this chapter, its condition is found, after examination, to be such that it could not meet the requirements for incorporation and authorization specified in such articles respectively; or (i) if such corporation has ceased to transact the business of insurance for a period of one year; or (j) commences voluntary liquidation or dissolution or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs or to dissolve its corporate charter or to procure the appointment of a receiver, custodian or sequestrator under any law except this chapter; or (k) if an application is made for the appointment of a receiver, custodian or sequestrator of the corporation or its property, or a receiver, custodian or sequestrator is appointed by a federal court or such appointment is imminent; or (l) on consent of a majority of the directors,

stockholders or members; or (m) shall not organize and commence the transaction of its business or undertake its corporate duties within one year from the date of its incorporation as provided for in section sixty-six-a of this chapter, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in which the principal office of such corporation is located for an order directing such corporation to show cause why the superintendent should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require. (Sub. 1 as amended by L. 1930, ch. 196, March 28; L. 1922, ch. 69; L. 1918, ch. 119.)

2. On such application, or at any time thereafter, such court or the justice of the supreme court before whom such order is returnable may, in its or his discretion, issue an injunction restraining such corporation from the transaction of its business or disposition of its property until the further order of the court, and such court or the justice of the supreme court before whom such order is returnable may, on such application or at any time thereafter, issue such other injunctions or orders as may be deemed necessary to prevent interference with the possession and control, or the title, rights or interest of the liquidator or the conduct of the business or liquidation; or to prevent waste of the assets or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the corporation or its estate while in

the possession and control of the superintendent of insurance or while in liquidation. On the return of such order to show cause, and after a full hearing, the court or the justice of the supreme court before whom such order is returnable shall either deny the application or direct such superintendent or his successors in office, forthwith to take possession of the property and conduct the business of such corporation, and retain such possession and conduct such business until, on the application, either of the superintendent, the attorney general representing him, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and the conduct of its business. (Subd. 2, as amended by L. 1918, ch. 119, April 3.)

3. If, on a like application and order to show cause, and after a full hearing, the court or the justice of the supreme court before whom such order is returnable shall order the liquidation of the business of such corporation, such liquidation shall be made by and under the direction of such superintendent, and his successors in office, who may deal with the property and business of such corporation in their own names as superintendents, or in the name of the corporation, as the court or the justice of the supreme court before whom such order is returnable may direct, and shall be vested by operation of law with title to all of the property, contracts and rights of action of such corporation as of the date of the order so directing them to liquidate. The filing or recording of such order in any record

office of the state shall impart the same notice that a deed, bill of sale or other evidence of title duly filed or recorded by such corporation would have imparted. The rights and liabilities of any such corporation, and of its creditors, policyholders, stockholders and members, and of all other persons interested in its assets, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation of such corporation in the office of the clerk of the county wherein such corporation had its principal office for the transaction of business upon the date of the institution of proceedings under this section.

* * * *

4. Whenever any of the grounds of jurisdiction over domestic corporations specified in subdivisions (a), (b), (c), (d), (e), (f) and (g) of subsection one of this section exist or arise with reference to any corporation incorporated by or existing under the government or laws of any country outside of the United States and authorized to transact the business of insurance and having assets in this state; or whenever any foreign corporation so authorized and having assets in this state has been placed in the hands of a receiver or had its property sequestered in its domiciliary state or country or in any other state or country, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in which such corporation has its principal office for the transaction of business in this state, for an order directing such corporation to show cause why the superintendent should not take possession of its property and conserve its assets for

the benefit of its creditors, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders or the public may require. (Subd. 4 added by L. 1912, ch. 217, April 8.)

5. On such application, or at any time thereafter, such court or the justice of the supreme court before whom such order is returnable may, in its discretion, issue an injunction restraining such corporation and its officers, agents, and employees from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing, the court or the justice of the supreme court before whom such order is returnable shall either deny the application or direct the superintendent forthwith to take possession of the property and conserve the assets of such corporation, and retain such possession until, on the application either of the superintendent, the attorney general representing him, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and conduct its business. If, on such application, the court shall direct the superintendent to take possession of the property and conserve the assets of such corporation, the rights and duties of the said superintendent with reference to such corporation and its said assets shall be those heretofore exercised by and imposed upon ancillary receivers of foreign corporations in this state. (Subd. 5 added by L. 1912, ch. 217, April

8; as amended by L. 1918, ch. 119, April 3.)

6. For the purposes of this section, the superintendent shall have power to appoint, under his hand and official seal, one or more special deputy superintendents of insurance, as his agent and agents, and to employ such counsel, clerks, and assistants as may by him be deemed necessary, and give each of such persons such powers to assist him as he may consider wise. The compensation of such special deputy superintendents, counsel, clerks, and assistants, and all expenses of taking possession of and conducting the business of liquidating any such corporation shall be fixed by the superintendent, subject to the approval of the court, and shall, on certificate of the superintendent, be paid out of the funds or assets of such corporation. During the progress of any proceedings taken under this section, the superintendent, his deputies, or any examiner authorized by him and the special deputy superintendent of insurance acting for the said superintendent therein shall have all of the powers given to the superintendent, his deputy, or any examiner authorized by him, by section thirty-nine of this chapter, including the power to examine under oath the persons specified in such section, and to compel the production of books and papers as therein provided. (Formerly subd. 4.)

7. For the purposes of this section, the superintendent shall have power, subject to the approval of the court, to make and prescribe such rules and regulations as to him shall seem proper. (Formerly subd. 5.)

8. The superintendent shall transmit to the legislature, in his annual report, the names of the corporations so taken posses-

sion of, whether the same have resumed business or have been liquidated, and such other facts as shall acquaint the policyholders, creditors, stockholders, and the public with his proceedings under this section; and, to that end, the special deputy superintendent in charge of any such corporation shall file annually with the superintendent a report of the affairs of such corporation. (Formerly subd. 6.)

9. All acts of the superintendent of insurance in taking or continuing in possession of any property, or in the regulation, conduct, or liquidation of the business, of any corporation to which this section is applicable, since the first day of January, nineteen hundred and nine, whether such taking possession, continuing in possession, regulation, conduct, or liquidation was in pursuance of a contract, by mutual consent or otherwise; are hereby ratified, legalized, and confirmed. (Formerly subd. 7.)

10. On such application or at any time after the court or a justice thereof shall order the liquidation of the business of any such corporation, as provided in paragraph number three of this section, the superintendent of insurance may apply for the dissolution of such corporation, and the same, after due notice and hearing and such other procedure as to the court or justice shall seem proper, shall be dissolved. (Subd. 10 as amended by L. 1918, ch. 119, April 3.) (Formerly subd. 8.)

11. The order to show cause and the papers upon which the same is made in any proceeding instituted under the provisions of this section shall be served upon the corporation named in such order, if it be a domestic corporation, by delivering to the president or other head of the corporation.

the secretary or clerk to the corporation, the cashier, the treasurer or a director or managing agent; if it be a foreign corporation, by delivering to the president, vice-president, treasurer or assistant treasurer, secretary or assistant secretary, director or managing agent, or if the corporation lack any of those officers within the state, to the officer performing corresponding functions under another name; if it be a voluntary, unincorporated, or a joint-stock association, order, or society, by delivering to the president, vice president, treasurer, director, trustee or other officer or a member with managerial powers; if it be a Lloyds association, by delivering to the duly designated attorney-in-fact, a true copy of said order to show cause and the papers upon which it was granted and leaving the same with any such person within the state. When it is satisfactorily proved by the report of an examiner of the insurance department made in accordance with the provisions of section thirty-nine of this chapter or by affidavit that the officers, directors, trustees, or managing agents or members of the corporation, association, order or society named in said order to show cause, upon whom service is required to be made as above provided, or, if a Lloyds association be named in the order to show cause, that the duly designated attorney-in-fact, have departed from the state or keep themselves concealed therein or if such of the persons residing in this state and upon whom service is required to be made as above provided have resigned from their offices within forty days prior to the application for an order to show cause under the provision of this section, or that service cannot be made immediately

by the exercise of reasonable diligence, such order to show cause may provide for service thereof in such manner as the court or justice by whom the same is made, shall direct. (Subd. 11 added by L. 1911, ch. 366, June 19; as amended by L. 1922, ch. 69, March 6.) (Formerly subd. 9.)

12. At any time after the commencement of proceedings under an order of liquidation made pursuant to this section, the said superintendent may remove the principal office of the corporation in liquidation to the county of Albany.. In event of such removal the court shall, upon the application of the superintendent, direct the clerk of the county wherein such proceeding was commenced to transmit all of the papers filed therein with such clerk to the clerk of the county of Albany, and the proceeding shall thereafter be conducted in the same manner as though it had been commenced in the county of Albany. (Subd. 12 added by L. 1913, ch. 29, February 19.)

APPENDIX C

THE LITVINOV ASSIGNMENT

WASHINGTON, *November 16, 1933.*

MY DEAR MR. PRESIDENT: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or to initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States; the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment. The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the

settlement referred to above not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or;

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM M. LITVINOFF,

*People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.*

MR. FRANKLIN D. ROOSEVELT,

*President of the United States of America,
The White House.*

THE WHITE HOUSE,

Washington, November 16, 1933.

MY DEAR MR. LITVINOV: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

"The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Re-

publics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims; and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized

by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

Mr. MAXIM M. LITVINOV,

*People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.*

APPENDIX D

EMBASSY OF THE
UNITED STATES OF AMERICA,
Moscow, January 7, 1937.

MR. MAXIM M. LITVINOV,

*People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics, Moscow.*

MR. PEOPLE'S COMMISSAR: I have the honor to inform you that it is the understanding of the Government of the United States that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.

The Government of the United States further understands that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the

United States Court of Claims, and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by you to the President of the United States on November 16, 1933.

Will you be good enough to confirm the understanding which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment?

I am, Mr. People's Commissar,

Very sincerely yours,

(Signed) LOY W. HENDERSON,

*Chargé d'Affaires ad interim of
the United States of America.*

MOSCOW, January 7, 1937.

MR. LOY W. HENDERSON,

*Chargé d'Affaires ad interim of the
United States of America, Moscow.*

MR. CHARGÉ D'AFFAIRES: In reply to your note of January 7, 1937, I have the honor to inform you that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations

and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors..

You are further informed that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the United States Court of Claims, and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by me to the President of the United States on November 16, 1933.

I have the honor, therefore, to confirm the understanding, as expressed in your note of January 7, 1937, which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment.

I am, Mr. Chargé d'Affaires,

Very sincerely yours,

G. LITVINOFF,

People's Commissar of Foreign Affairs,

Union of Soviet Socialist Republics.

APPENDIX E

NEW YORK CIVIL PRACTICE ACT

§ 476. JUDGMENT ON PLEADINGS OR ADMISSION OF PART OF CAUSE. Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require. (New. See Code § 511, in part; § 547.)

NEW YORK RULES OF CIVIL PRACTICE

RULE 113. SUMMARY JUDGMENT. When an answer is served in an action,

1. To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

2. To recover a debt or liquidated demand arising on a judgment for a stated sum; or

3. On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

4. To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed, other than for breach of promise to marry; or

5. To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

6. To enforce or foreclose a lien or mortgage; or
7. For specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the case may require; or
8. For an accounting arising on a written contract, sealed or not sealed.

The complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues. If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.

If the plaintiff or defendant in any action set forth in subdivisions 3, 4, or 5 hereunder shall fail to show such facts as may be deemed, by the judge hearing the motion, to present any triable issue

of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the court alone, or by the court and a jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any actions in cases set forth in subdivisions 6, 7, and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions. (As amended March 14, 1932, and May 11, 1933; in effect June 15, 1933.)

APPENDIX F

DEPARTMENT OF STATE,
Washington, March 26, 1938.

ROLAND S. MORRIS, ESQ.,
*Chairman, Association of American
Creditors of Russia,*
120 Broadway, New York, N. Y.

SIR: The Department has received your letter of March 23, 1938, regarding the disposition to be made of funds that may be recovered under the Litvinoff Assignment of November 16, 1933.

The Department has always had in mind that whatever funds are recovered as a result of that Assignment would be made available, in whole or in part, to American private claimants.

Very truly yours;

For the Secretary of State:

R. WALTON MOORE, *Counselor.*

(149)

THE COPY

U.S. DEPT. OF JUSTICE
RECEIVED
DEC 15 1941
CHARLES E. MORGAN
CLERK

No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF
THE STATE OF NEW YORK, AND AS LIQUIDATOR OF
THE DOMESTICATED UNITED STATES BRANCH OF
THE FIRST RUSSIAN INSURANCE COMPANY, ESTAB-
LISHED IN 1827; VICTOR YERMALOFF, AND OTHERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW YORK, NEW YORK COUNTY

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

THE COURTS BELOW DID NOT DETERMINE THAT THE
SOVIET DECREES WERE NOT INTENDED TO COVER THE
ASSETS IN NEW YORK

Respondent's brief (pp. 14-21) and that filed
on behalf of the surviving directors of the Insur-
ance Company, as *amici curiae* (pp. 7-12), stress
a presumed determination by the New York
courts, on the basis of the record in *Moscow Fire*
Ins. Co. v. Bank of New York, 280 N. Y. 286,

that the Soviet decrees were not intended to apply to the assets of the First Russian Insurance Company in New York. We have shown in Point III of our main brief (pp. 78-84) that this contention is wholly untenable. In view of respondent's insistence on the point, we shall amplify the argument in this reply brief.

Respondent's motion to dismiss the complaint and for summary judgment (R. 10-11) was founded on Section 476 of the Civil Practice Act of New York, providing for judgment on the pleadings, and Rule 113 of the Rules of Civil Practice, providing for summary judgment. In this Court, respondent has abandoned any claim that the courts of New York could, or did, determine the scope of the Soviet decrees under Section 476 (Br. for Respondent, pp. 4-5, 14-15). Reliance is placed solely upon Rule 113.

The argument as to summary judgment is that the affidavit on behalf of the United States asserted no facts in support of the complaint, nor did it deny any of the allegations of the answer, or of the moving affidavit. It is claimed, therefore, that under Rule 113 all of the allegations in the answer, including those concerning the scope of the Soviet decrees, were necessarily admitted, or that, at best, no issue was raised by the United States as to these allegations, and it was conceded that this case was wholly governed in all its aspects by the *Moscow* decision. This argument is

wholly unsupported by the New York decisions and by the record in this case. No issue of fact was raised by respondent or decided by the courts below.

1. Rule 113 permits a motion for summary judgment to be entertained and summary judgment to be awarded even though only issues of law are raised by the moving party. *Rotenbach v. Young*, 119 Misc. 267, 268 (Sup. Ct.), affirmed on opinion below, 206 App. Div. 775 (2d Dept.); *Coutts v. Kraft & Bros. Co.*, 119 Misc. 260, 261 (Sup. Ct.), affirmed 206 App. Div. 625 (2d Dept.); *Nostane Products Corp. v. Chas. L. Huis-king*, 262 App. Div. 754 (2d Dept.). In such a case, and when only the legal sufficiency of a complaint or answer is attacked by the moving party, the defending party is not required to support the factual allegations of his pleading by affidavit or other proof. *Hessian Hills Country Club v. Home Ins. Co.*, 262 N. Y. 189, 195-196; *Goess v. A. D. H. Holding Corp.*, 85 F. (2d) 72, 75 (C. C. A., 2d) (applying the New York rule). "Upon a motion for summary judgment [by the plaintiff] a defendant is under no burden to show that affirmative allegations in the defense are not sham when the attack on such allegations is made solely on the ground that they are insufficient in law." *Hessian Hills Country Club v. Home Ins. Co.*, *supra*.

It is clear, as we point out in our main brief (pp. 80-81) that respondent's moving affidavit itself raised no issue of fact, and disclaimed such issue raised by its answer. It merely attacked the sufficiency of the complaint. It also stated that (R. 16): "Your deponent verily believes that there is no merit *as a matter of law* to the action set forth in the complaint herein." [Italics added.] The references to the *Moscow* case all concern its holding on matters of law, e. g. (R. 14): "Whatever may have been the law when the complaint herein was served and issue joined by the defendant's answer, it is now authoritatively settled * * * that the right to assets belonging to the United States Branch of a Russian insurance company is not dependent upon the 'law of Russia as formulated in the Soviet decrees,' and that no decree 'could possibly have been intended to apply to business conducted here, or if so intended could be binding here'."

Being thus under no duty to support the allegations of fact in its complaint, the United States contented itself with filing an answering affidavit stating that the *Moscow* case, the "decision in which case the Superintendent of Insurance alleges as his authority for the dismissal of the complaint herein" (R. 51, cf. R. 50), was about to be heard by this Court. It is nowhere even stated that the petitioner agreed with the Superintendent

that the decision of the Court of Appeals in the *Moscow* case was authority as to any issue in the instant case. It follows that the answering affidavit cannot be construed as a concession or admission, and the failure to offer proof in support of the factual allegations of the complaint is immaterial. Moreover, the United States has never conceded, in the courts below or here, that any issues of fact are involved in the present proceeding, or that the *Moscow* decision governs the question of the scope of the Soviet decrees.

2. In any case, as we have shown (main br. pp. 82-84), the mass of testimony in the *Moscow* case on the scope of the Soviet decrees is not such non-testimonial "documentary evidence or official record" as will ground a motion for summary judgment under the fifth paragraph of Rule 113.¹ In *Lederer v. Wise Shoe Co.*, 276 N. Y. 459, 464, the Court of Appeals said, in explaining why the paragraph in question applied to all actions and was not limited to those mentioned in the first eight subdivisions of the rule:

Where proof is dependent upon affidavits made by persons not subject to cross-

¹ Respondent's brief refuses to consider what provision of the rule is applicable (p. 19), and he relies on very general statements as to the purpose of the rule (p. 16), but it is clear that the fifth paragraph is the only relevant provision (main br. p. 82). This the brief on behalf of the surviving directors seems to admit (pp. 8-9).

examination, sound reason may be found for limiting summary judgment to classes of actions deemed appropriate. It is difficult to find any reason for imposing such a limitation where a legal defense is established by *documentary evidence or official record* and there is no issue about the verity or conclusiveness of the proof.

Respondent's view leads to the inadmissible conclusion that an affidavit on record in any case could be used as "documentary evidence or official record" to support summary judgment in other proceedings.

3. Even if the testimony on the meaning of the decrees contained in the *Moscow* record, were properly the basis for a motion for summary judgment, and had the United States failed to present opposing proof, it is improbable that summary judgment would have been granted. As we show below, respondent could not rest on the bar of *res judicata*, and he did not attempt to do so. That being so, the evidence and findings in the *Moscow* record would have to be so convincing that, without more, the court would say that only one conclusion as to the scope of the decrees could be reached. Cf. *Gen. Investment Co. v. Interborough R. T. Co.*, 235 N. Y. 133, 139, 142-143; *Curry v. Mackenzie*, 239 N. Y. 267, 269-270. If the trier of facts could properly reach one result

or another, the motion must be denied. It seems clear that a trial judge could properly conclude that the decrees were intended to reach the New York assets. See Rippey, J., dissenting in *Moscow Fire Ins. Co. v. Bank of New York*, 280 N. Y. 286, at 324. The decision of the Court of Appeals in the *Moscow* case does not foreclose such a holding, since the court there merely confirmed the Master's findings as supported by evidence (280 N. Y., at 306). There is nothing to show that a contrary finding would not have been equally supportable.

4. The opposing briefs hint, somewhat vaguely, that the *Moscow* case is *res judicata* on all points. But since respondent was not a party to the *Moscow* suit, he can not plead the defense of former adjudication. *Elder v. New York & Penn Motor Express, Inc.*, 284 N. Y. 350 (1940); *Goodman v. Kirshberg*, 261 App. Div. 257 (1st Dept., 1941); *Daly v. Terpening*, 261 App. Div. 423 (4th Dept., 1941); *Kessler v. Fligel*, 240 App. Div. 232 (1st Dept.) affirmed without opinion 266 N. Y. 508; *Kearns Coal Corp. v. United States Fidelity & Guaranty Co.*, 118 F. (2d) 33, 37 (C. C. A., 2d) (stating New York law). These cases hold that it is immaterial that the party against whom the bar of *res judicata* is sought to be raised was a party to a prior suit and there litigated issues

presently involved. He has the right to litigate anew.

Respectfully submitted.

✓ CHARLES FAHY,
Solicitor General.

✓ FRANCIS M. SHEA,
Assistant Attorney General.

✓ MELVIN H. SIEGEL,

✓ RICHARD H. DEMUTH,

✓ PAUL A. SWEENEY,

OSCAR H. DAVIS,

Attorneys.

IRVIN C. RUTTER,

NOEL HEMMENDINGER,

Special Assistants to the Attorney General.

DECEMBER 1941.

FILE COPY

APR 22 1941

IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

No. 909 *42*

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; VICTOR YERMALOFF; and Others,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, AND THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827.

JOHN M. DOWNES,

Attorney for Louis H. Pink, Superintendent of Insurance of the State of New York as Liquidator of the Domesticated United States Branch of First Russian Insurance Company, Established in 1827, Respondent,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

No. 903

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; VICTOR YERMALOFF, and Others.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, AND THE COURT OF APPEALS OF THE STATE OF NEW YORK

**BRIEF IN OPPOSITION FOR RESPONDENT LOUIS H. PINK,
SUPERINTENDENT OF INSURANCE OF THE STATE OF
NEW YORK, AS LIQUIDATOR OF THE DOMESTICATED
UNITED STATES BRANCH OF THE FIRST RUSSIAN
INSURANCE COMPANY, ESTABLISHED IN 1827**

Opinions Below

The memorandum decision of the New York County Supreme Court (R. 52) is not reported. The decision resulting in the order and judgment of affirmance by the Appellate Division, First Department of the New York Supreme Court (R. 57, 61) was rendered without opinion

and is reported in 259 App. Div. 871. The *per curiam* opinion of the Court of Appeals of the State of New York is reported in 284 N. Y. 555, advance sheets of March 22nd, 1941. No application was made for rehearing or certification of questions in the highest State Court.

Jurisdiction

The same questions now raised in the case at bar were raised by the same petitioner and decided adversely to it in the case of *Moscow Fire Ins. Co. v. Bank of New York and Trust Co.*, 280 N. Y. 286, affirmed 309 U. S. 624, rehearing unanimously denied by the full Court 309 U. S. 624. (See Journal of March 25th, 1940, No. 355—October, 1939 Term.)

The only question raised by the record in the case at bar was whether the Special Term should decide the motion for summary judgment or await a decision by this Court in the *Moscow* case (R. 50-51). No other question in the instant case was involved or raised in the Court below which had not been finally settled and decided in the *Moscow* case where the State Courts found as a matter of fact that the same Soviet decrees (R. 13-14, 15-16) under which the same petitioner as assignee claims here did not apply to assets in New York of insurance companies nationalized in Russia. The decision in the *Moscow* case was not based on any federal ground, and the New York Court of Appeals, the highest State Court, has held there is no difference here (284 N. Y. 555). There is no reason shown why certiorari should be granted on the present application to again review the same questions recently decided adversely to the petitioner by this Court.

There is no basis for petitioner's assertion that the State Courts did not recognize the Litvinoff assignment of

November 16, 1933. Giving all due recognition and effect to the Litvinoff assignment (R. 36a-36b) the *Moscow* case conclusively settled that in so far as assets of the character involved here were concerned, nothing passed by virtue of that assignment, the assets in question having at all material times been in lawful custody and possession of a State officer in New York beyond the scope and effect of the Soviet decrees. Any question as to the effect or operation of the Soviet decrees within Russia is not involved here but that such decrees did not operate and by their own terms were not intended to operate to affect the assets involved in the case at bar was settled in the *Moscow* case.

There is no federal question involved in the case at bar. The claim asserted by the plaintiff herein is predicated solely upon confiscatory decrees and laws of the Soviet Russian Government (Complaint, Pars. 8, 9, 10; R. 23-24), and is not based on any treaty or federal law. There is no question here as to the validity of a treaty or statute of the United States or the validity of any State statute as being repugnant to the Constitution, treaties or laws of the United States. Nor is there involved here any right, title, privilege or immunity under the Constitution or any treaty or statute of the United States, or commission held or authority exercised under, the United States within the meaning of Section 237(b) of the Judicial Code. There is merely a question of title to assets always situate in New York belonging to the Domesticated United States Branch of the First Russian Insurance Company, a separate and distinct entity under the laws of the State of New York, claimed by petitioner as assignee under nationalization and confiscation decrees of the Soviet Russian Government.

The petition (p. 2) asserts that the decision of the Court below gives rise to the question whether State law

or Federal law determines title to the property involved in the instant case. The petition does not show, however, any specific federal law, constitutional provision or treaty upon which such contention is founded. The Litvinoff assignment and its acceptance (R. 36a-36c) only authorized prosecution by the United States Government of any claim the Soviet Russian Government might theretofore have prosecuted subject to the laws of the jurisdiction in which such claim might be advanced or made. The assignment and acceptance by the United States did not give any greater force or effect to such claims as might be made nor were they altered in any respect. Nothing new was created concerning such claims different from what may have existed prior to the assignment and the agreement did not purport to nor could it lawfully confer any greater rights than the Soviet Government itself could exercise after recognition. No local or State laws or rights vested pursuant thereto were purported to be overridden by virtue of the assignment and acceptance (*Guaranty Trust Co. v. United States*, 304 U. S. 126, 143). The United States in the case involved here has no greater rights before the Court as a claimant or litigant than a private party (*Guaranty Trust Co. v. United States*, *supra*).

POINT I

The complaint was dismissed and the motion for summary judgment was correctly decided because the action was prematurely brought.

Although the basic facts in the *Moscow* and *First Russian* cases concerning organization in the United States are identical, there are some important vital differences of

which this Court should be apprised, particularly with regard to the surplus fund which the Government claims.

The Moscow and First Russian were both taken over for liquidation in 1925. Both were Russian companies with domesticated United States Branches in New York, organized and doing business in accordance with New York requirements.

In February, 1931, the New York Court of Appeals (*Matter of People, First Russian Ins. Co.*, 255 N. Y. 415) directed the Superintendent of Insurance to pay all valid foreign claims filed in the liquidation proceedings of both the Moscow and First Russian companies and to pay the surplus then remaining, that is, the surplus remaining after payment by the Liquidator of all valid foreign claims filed with him, in the case of the Moscow to its Conservator, and in the First Russian to the company represented by its Board of Directors (R. 28-29, 40). The decision of 255 N. Y. 415 was a final non-appealable judgment, finally settling and fixing the rights of creditors, and its decision was approved by this Court in 296 U. S. 463, 476, where the Court said:

"The state court still had control of the property and questions as to the rights of the parties who were before it, or of those who might come before it, were legal questions which the court had jurisdiction to decide."

The distribution of funds was fixed not only by the decision in 255 N. Y. 415, but by the decision of the New York Court of Appeals in the liquidation proceedings in *Matter of People, First Russian Insurance Company*, 274 N. Y. 545 (May, 1937), which allowed interest on certain claims.

In the *Moscow* proceeding relatively few claims were filed, there was a surplus after payment of all foreign claims filed with the Liquidator and the surplus was turned over to a depositary (the conservator having elected not to put up a bond). Thereafter, a proceeding was instituted by the conservator and stockholders to determine the method of distribution of that surplus fund. The Liquidator was not a party to that action since he had completed his duties when the Moscow surplus was turned over. The United States, however, intervened in said action, asserting paramount title, over and above the title of the stockholders or owners of the company, to the surplus which had been turned over by the Liquidator.

In the First Russian liquidation proceeding, however, the Liquidator is still functioning, the liquidation is still incomplected (R. 16, 34, 42, 48). In this proceeding no stockholders are involved, and there is as yet no surplus available to be turned over to the company. Unlike the *Moscow* case the Liquidator here has not paid all the valid and allowed claims filed with him pursuant to this Court's decision in 1931, and has not turned over any surplus to the company represented by its Board of Directors.

There is no surplus as defined by the Court of Appeals in 255 N. Y. 415 (R. 28-29) and there cannot be any until all claims have first been paid, some of them with interest which is accumulating every day. Only then can it be determined whether a surplus exists.

POINT II

On the record in the case at bar and under purely New York Law the complaint was properly dismissed and judgment rendered in favor of respondent, pursuant to Section 476 of the Civil Practice Act and Civil Practice Rule 113.

On the record now before this Court the New York County Supreme Court properly granted the present respondent's motion for summary judgment and dismissed the complaint (R. 52): That motion was made under and in conformity with *Civil Practice Rule 113* and *Section 476 of the Civil Practice Act*. (Appendices A and B, *post*.) It was not, as groundlessly asserted in the petition, a motion to dismiss the complaint for insufficiency as in the case of *United States v. Belmont*, 301 U. S. 324, relied upon by Petitioner (p. 2). The motion was duly made (R. 10) on the complaint (R. 19), answer (R. 37), and supporting affidavit (R. 12) showing the instant claim of petitioner to be identically the same as the claim of the United States denied and dismissed in the *Moscow* case, and that the facts and Soviet law with respect to both claims and the Soviet decrees relied upon by petitioner were the same as in the *Moscow* case (*supra*) then recently decided by the New York Court of Appeals (R. 14). The petitioner was required, under the fifth paragraph of Civil Practice Rule 113 providing for judgment in favor of a moving defendant showing facts establishing *prima facie* the sufficiency of its denial or defenses, to show facts "by affidavit or other proof" sufficient to raise issues requiring and entitling plaintiff to a trial. Prior to institution of the motion, the law of the State of New York with respect to the issues

involved here had been conclusively settled by the Court of Appeals in the *Moscow* case, the record and remittitur of which were contained in the files and records of the Supreme Court where the motion for dismissal and summary judgment in the instant case was decided, of which the Court had judicial notice. The petitioner's affidavit on the motion (R. 50) alleged or set forth no facts or other proof whatsoever which might entitle it to a trial of the issues, and merely requested a postponement until final determination of the *Moscow* case, and, in effect, constituted recognition and admission by petitioner that the *Moscow* decision was controlling in the case at bar. Indeed, upon argument of the instant case in the Court of Appeals the brief for the United States said (p. 8):

“ * * * Plaintiff-appellant believes that the trial court was correct in its interpretation of the *Moscow* case, and that adherence to the decision in that case would require dismissal of the present complaint. * * * ”

The fifth paragraph of Rule 113 provides that:

“ Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit or other proof shall show such facts as may be deemed by the judge hearing the motion sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record. ”

Under the provision of the rule just quoted, the defendant (respondent in the present application) properly moved for summary judgment on the official record in the *Moscow* case irrespective of the question whether the instant case

is one of those enumerated in the eight preceding numbered sub-divisions of the first paragraph of Rule 113 (*Lederer v. Wise Shoe Co.*, 276 N. Y. 456; *White v. Merchants Dispatch Transportation Co.*, 256 App. Div. 1044; *Levine v. Behn*, 257 App. Div. 156; *Pross v. Foundation Properties, Inc.*, 158 Misc. 304).

Since no specific objection relating thereto was made, it was not indispensable that the official record in the *Moscow* case was not physically attached to the moving papers herein (*White v. Merchants Dispatch Transportation Co.*, *supra*). In any event the record and remittitur of that case were officially filed in the New York Supreme Court, and the decision officially reported, of which the Court took notice. The opposing affidavit of the United States (R. 50) denied none of the facts alleged in the moving affidavit and showed no facts whatsoever other than that it was proposed to apply to the United States Supreme Court for a writ of certiorari in the *Moscow* case. It is well established law and practice in the State of New York that on motions of this character a plaintiff cannot rely on the allegations of the complaint as proof (Rule 113; *White v. Merchants Dispatch Transportation Co.*, *supra*; *Gnozzo v. Marine Trust Co.*, *Buffalo*, 258 App. Div. 298, *aff'd* 284 N. Y. 49). Consequently, the reliance by the petitioner, United States, upon the *Belmont* case, where the allegations of the complaint had to be accepted as true, is not well founded.

POINT III

There is no federal question involved here and the decision of the New York Court of Appeals was based upon sufficient and independent non-federal grounds.

The *per curiam* opinion in the case at bar (284 N. Y. 555) incorporates by reference and is based upon the prior opinion in the *Moscow* case (280 N. Y. 286), in which latter decision the *Belmont* case was expressly distinguished. The basic decision clearly shows that it is based upon findings in accordance with State law that the Soviet decrees upon the facts proven did not apply to the tangible assets deposited pursuant to law in New York State of the domesticated branch of a nationalized Russian Insurer. That, alone, is an adequate non-federal ground for the decision of the Court below requiring dismissal of the present petition (*Tax Commission v. Wilbur*, 304 U. S. 544; *Lynch v. New York*, 293 U. S. 52, 54, 55; *Knights of Pythias v. Meyer*, 265 U. S. 30, 32, 33), or its denial, (*Public Service Comm'n v. Wisconsin Tel. Co.*, 309 U. S. 657; *McGoldrick v. Gulf Oil Corp.*, 309 U. S. 2; *New York City v. Central Savings Bank*, 306 U. S. 661; *Honeyman v. Hanan*, 300 U. S. 14).

The corporation here involved was in effect a domiciliary New York corporation governed by New York law. So far as Soviet law and decrees are concerned, even if they were to be given effect, would not avail the petitioner, since the assets involved having always been located in New York and the corporation being a New York corporation, New York law governs. The Court of Appeals in the *Moscow* case has unequivocally stated that under New York law the Government, the petitioner here, is not entitled to the funds.

The further holding of the Court of Appeals in the *Moscow* case and in the instant case, following a long line of prior decisions, to the effect that the United States branch of a foreign insurance company established under the New York Insurance Law, constitutes an entity separate and distinct from the parent company and analogous to a domestic corporation, likewise raised no federal question since it depended entirely upon the construction of local state law (*Neblett v. Carpenter*, 305 U. S. 297, 302).

No new or novel federal question is presented by the record now before this Court nor was any such raised. Briefed or oral arguments in the State Courts as to federal questions cannot be availed of (*Lynch v. New York*, 293 U. S. 52, 54; *Zadig v. Baldwin*, 166 U. S. 485).

CONCLUSION

For the reasons hereinbefore stated the petition for certiorari should be denied.

Respectfully submitted,

JOHN M. DOWNES,
Attorney for Louis H. Pink, Superintendent
of Insurance of the State of New York as
Liquidator of the Domesticated United
States Branch of First Russian Insurance
Company, Established in 1827, Respondent,

April 21, 1941.

[APPENDICES FOLLOW]

Appendix A

NEW YORK CIVIL PRACTICE ACT

§ 476. JUDGMENT ON PLEADINGS OR ADMISSION OF PART OF CAUSE. Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require. (New. See Code § 511, in part; § 547.)

Appendix B

NEW YORK RULES OF CIVIL PRACTICE

RULE 113—SUMMARY JUDGMENT. When an answer is served in an action.

1. To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

2. To recover a debt or liquidated demand arising on a judgment for a stated sum; or

3. On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

4. To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed, other than for breach of promise to marry; or

5. To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

6. To enforce or foreclose a lien or mortgage; or

7. For specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the case may require; or

8. For an accounting arising on a written contract, sealed or not sealed.

The complaint may be dismissed or answer may be strack out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues. If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.

If the plaintiff or defendant in any action set forth in subdivisions 3, 4 or 5 hereunder shall fail to show such facts as

may be deemed, by the judge hearing the motion, to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the court alone, or by the court and a jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any actions in cases set forth in subdivisions 6, 7 and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions. (As amended March 14, 1932, and May 11, 1933; in effect June 15, 1933.)

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No. 42

IN THE
Supreme Court of the United States
OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827; VICTOR YERMALOFF, AND OTHERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

BRIEF FOR RESPONDENT LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827.

ALFRED C. BENNETT,

Counsel to the Superintendent of Insurance of the State of New York, as Liquidator of the Domesticated United States Branch of The First Russian Insurance Company, Established in 1827, Respondent.

160 Broadway,
New York City, N. Y.

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Opinions Below

The memorandum opinion of the Special Term Justice of the Supreme Court, New York County, (R. 52) is reported. The judgment and order was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York (First Judicial Department) without opinion (R. 57), reported in 259 A. D. 871. The judgment was unanimously affirmed by a per curiam opinion of the New York Court of Appeals (R. 71-72), reported in 284

N. Y. 555. The opinion of the New York Court of Appeals in *Moscow Fire Insurance Co. v. Bank of New York*, is reported in 280 N. Y. 286.

Jurisdiction

The appellant claims that jurisdiction of this Court rests upon Section 237 (h) of the Judicial Code, as amended by the Act of February 13, 1935. Respondent contends, as is more fully set forth in Point One hereunder, that the writ of certiorari in this case was improvidently granted, that there are no federal questions to be determined, and that this appeal should be dismissed upon this ground alone as well as upon the merits. Neither the petition for the writ of certiorari hereunder nor appellant's brief herein disclose any specific federal law, constitutional provision, or treaty violated by the decision below, raising a question to be decided by this honorable Court. The Litvinoff assignment and its acceptance (R. 36a-36c) merely authorized prosecution by the United States Government of any claim the Soviet Government might theretofore have prosecuted, subject to the laws of the jurisdiction in which such claim might be advanced or made. The assignment and acceptance by the United States, sometimes referred to as the treaty, did not give any greater force or effect to such claims nor were they altered in any respect (*Guaranty Trust Co. v. United States*, 304 U. S. 126, 143; *United States v. Belmont*, 301 U. S. 324, 335, 336; *United States v. Bank of N. Y. and Trust Co.*, 296 U. S. 463; *Moscow Fire Ins. Co. v. Bank of N. Y.*, 280 N. Y. 286; aff'd. 309 U. S. 624; rehearing denied, 309 U. S. 697).

Questions Presented

1. Whether under applicable statutes and decisions of the New York Courts, construing its Rules of Civil Practice and the provisions of its Civil Practice Act, summary judgment in favor of the respondent dismissing the complaint of

the United States of America herein on the merits, was properly granted by the court below.

2. Is it proper, and will this Court upon the present appeal permit petitioner to reargue the case of *The United States v. Moscow Fire Insurance Company*, decided on February 12th, 1940 by this Court, 309 U. S. 624; rehearing denied 309 U. S. 697.

3. If so, and respondent respectfully submits that rehearing having already been denied in that case by this honorable Court, it should not be heard on this appeal, nevertheless, the decision in the *Moscow* case was correct.

Summary of Argument

Not only were all the questions involved in the present record determined adversely to the Government in the *Moscow* case (309 U. S. 264), which case appellant is attempting to reargue on the present record, but the primary question involved herein is the propriety of the judgment of the highest court of New York granting summary judgment under Rule 113 of the Rules of Civil Practice. Briefly stated, the rule requires judgment dismissing the complaint if either party, challenged by the opponent's motion papers and affidavits, fails to show that an issue is present calling for a trial. No such issue was established by appellant, and the New York Court of Appeals in the decision below (284 N. Y. 555) affirmed judgment under Rule 113 in favor of the defendant, Superintendent of Insurance. It found that there were no new issues and that the decision of the New York Court of Appeals in the *Moscow* case (280 N. Y. 286; affirmed by this Court, 309 U. S. 624) left open no question presented by the record herein. The New York Court of Appeals unanimously agreed that without again considering such questions, in determining title to assets of First Russian Insurance Company deposited in New York, it should apply in this case the same rules of law which the court applied in determining title to the assets of

the *Moscow Fire Insurance Company* deposited here. This case does not come before this Court on a demurrer where the facts are admitted for the purposes of the motion. Petitioner, in its brief repeatedly makes this assertion but is clearly in error as to New York practice rules. It is well established in New York that on motions under Rule 113 a plaintiff cannot rely on the allegations of the complaint as proof, nor are they deemed to be true (*White v. Merchants Dispatch Transportation Co.*, 256 App. Div. 1044; *Gnozzo v. Marine Trust Co.*, 258 App. Div. 298, aff'd 284 N. Y. 617).

It is respectfully submitted that this Court under well defined rules and precedents will not review or, if it does review, should accept the construction placed upon state statutes by the highest court of such state.

Respondent does not believe that this Court will tolerate a reargument of the *Moscow* case upon the record at bar. The holdings in the *Moscow* case, nevertheless, were amply supported by the record therein, and the law as established by the Court of Appeals in 280 N. Y. 286 was justified in all respects.

This case raises no federal question whatsoever, is based purely upon a construction of state law, applicable to assets located in the state, and should be dismissed for that reason alone as well as upon the merits.

Statement

The statement of facts set forth in appellant's brief, at pages 4 to 11, is correct, with the following modifications:

Throughout its brief appellant emphasizes the point that the complaint was dismissed by the New York courts for failure to state a cause of action, and that under the applicable New York statute (New York Civil Practice Act) and decisions thereunder, the allegations set forth in the complaint must be deemed to be true just as though the defendant had demurred; therefore, that the defendant conceded the fact and conclusion of law advanced by the Govern-

ment, to wit, that under the Soviet decrees title to assets, wherever situated, passed to the Soviet Government by virtue of the said decrees. As more fully hereunder shown by respondent, a motion for summary judgment does not concede any of the facts set forth in the complaint, but, on the contrary, puts the plaintiff to the burden of establishing by affidavit or other competent evidence that there is a real issue worthy to be tried by the court. Appellant was unable to sustain this burden and the court below properly found that there was no issue and that the complaint should be dismissed (see Point Two hereunder). In the *Moscow* case, and obviously in this case, respondent not only denies, but the courts have held, that the decrees did not and could not have vested title in the Soviet Government to these New York assets. Respondent's answer in no uncertain terms denies each and every allegation of the complaint purporting to establish that the New York assets passed to the Soviet Government, appellant's assignor herein (R. 37-49).

Appellant on page 8, referring to the full trial had in the *Moscow* case (280 N. Y. 286; affirmed 309 U. S. 624), states that "many of the same questions" as are presented by the pleadings herein were decided in that case. Respondent respectfully submits that the very same questions as are presented in the case at bar were before the New York courts and this Court in the *Moscow* case, and were resolved against the Government. There is possibly one difference between the *Moscow* case and the case at bar, namely, that in this case it would appear from the records in the Superintendent's possession, that there is no surplus after paying or making provision for the payment with interest of all allowed foreign claims filed with the Superintendent, as liquidator and the foreign claims covered by pending attachment suits in the New York Supreme Court. In the *Moscow* case it was asserted that after paying foreign claims there still existed a surplus, which, at least, should be given to the Government in preference to the shareholders or directors who were asserting claims thereto.

In the case at bar, there are no shareholders' claims, and, although the transcript of record does not clearly set forth the present figures, the Superintendent of Insurance, as liquidator, an administrative official of the State of New York, is taking the liberty of showing in the footnote hereunder the present status of the assets and claims.¹

¹ An analysis of the assets on hand in the Liquidator's possession and foreign claims filed and allowed, but unpaid, together with foreign claims covered by pending attachment suits in the New York Supreme Court, all as of December 1st, 1941,—reflects the following situation:

Cash in Banks	\$ 587,131.16	
Less amount reserved for expenses of liquidation pursuant to Court order	25,810.06	
Amount of cash available for pay- ment of foreign claims and in- terest	\$ 561,321.10	
Securities owned (approx. present- day value)	611,160.00	
Total	\$1,172,481.10	
Unpaid allowed foreign claims		\$ 283,635.70
Unpaid interest at 6% on all foreign claims heretofore allowed with in- terest by Court orders		371,742.80
Foreign attachment suits pending (exclusive of interest)		758,382.54
Calculated approximate interest at 6% on these foreign attachment claims, computed from October 16th, 1931 to December 1st, 1941.		460,717.39
Total liability for unpaid foreign claims and attachments with es- timated interest		\$1,874,478.43
Possible additional liability for in- terest on interest unpaid		108,109.72
Total known and possible liability on all foreign claims filed and at- tachments as of December 1st, 1941		\$1,982,588.15

The fact that in the First Russian proceedings there was no surplus after paying or providing for payment of all just foreign claims was confirmed by order of the New York Supreme Court dated and entered May 13, 1932. It found that after payment of domestic creditors the surplus was \$1,393,198.42 but after providing (in accordance with 255 N. Y. 415) that foreign claims theretofore filed might be proven in the liquidation proceedings, it decreed that "there were no surplus assets against which further attachments might be levied or available for distribution to a quorum of the directors of the Insurance Company" (Government's complaint herein, par. 17; R. 29).

In the Moscow proceeding relatively few claims were filed, there was a surplus after payment of all foreign claims filed with the Liquidator and the surplus was turned over to a depository (the conservator having elected not to put up a bond). Thereafter, a proceeding was instituted by the conservator and stockholders to determine the method of distribution of that surplus fund. The Liquidator was not a party to that action since he had completed his duties when the Moscow surplus was turned over. The United States, however, intervened in said action, asserting paramount title over and above the title of the remaining foreign creditors, stockholders or owners of the funds, to the surplus which had been turned over by the Liquidator.

In the First Russian liquidation proceeding, however, the Liquidator is still functioning, the liquidation is still incomplete (R. 16, 34, 42, 48). In this proceeding no stockholders are involved, and there is no surplus available to be turned over to anyone. Unlike the *Moscow* case the Liquidator here has not paid all the valid and allowed claims filed with him pursuant to the Court of Appeals decision in 1931, and has not turned over any surplus to the company represented by its Board of Directors. It is quite apparent that there will be no such surplus.

The assignment or so-called treaty upon which the Government bases its claim (complaint, par. 19; R. 31 and

R. 36a-36d) was expressly conditioned upon a final settlement of claims and counterclaims between the Government of the Union of Soviet Socialist Republics, the United States of America and the claims of their nationals. The defendapt herein in its answer (R. 45) shows that on information and belief the negotiations for such settlement have been terminated with no settlement arrived at, and that, therefore, the conditions of the said agreement or assignment have not been complied with and it is now in all respects null and void and non-enforceable. The motion by defendant for summary judgment herein put plaintiff to its proof, or at least to prima facie evidence to be supplied in an affidavit, supporting the validity of the assignment. No such proof by affidavit, or otherwise, was offered by the Government.

The answer (par. 11; R. 43) raises the additional point that in the so-called assignment-treaty the Soviet Government agreed not to make any claim with respect to judgments rendered or that may be rendered by the American courts in so far as they relate to property or rights or interest therein, in which the Soviet Government or its nationals may have had or may claim to have an interest (Complaint, Ex. 1; R. 36b and 36d). The decision of the New York Court of Appeals, reported in 255 N. Y. 415, and the orders of the New York Supreme Court entered on the remittitur thereof, completely and with finality directed and fixed the disposition of the surplus assets. These are final orders from which there was no appeal. The subsequent decision of the New York Court of Appeals and of this Court in the *Moscow* case, and in the case at bar, merely carried out the provisions of these final orders. Apparently, the Soviet Government and the United States Government itself, recognized this by the wording of the assignment and the acceptance thereof.

The Interest of the State of New York

Appellant refers on page 11 of its brief to the interest of the State of New York and contends that the State, as such, "has no interest whatever apart from the physical presence of the assets within the State." The State of New York is not a party to this proceeding and never has been. The assets have at all times been held by the Superintendent of Insurance of the State of New York, as statutory liquidator and trustee of the funds, whose duty it is at all times to administer them subject to the statutes and court orders and decisions of New York State. For many years, and prior to the decision of the New York Court of Appeals in *Matter of People, (First Russian Insurance Co.)*, 255 N. Y. 415, the Superintendent of Insurance, as liquidator and trustee, after adjudicating and making provision for the payment of all domestic claims, with interest, had recommended as his plan for the disposition of the surplus, that the same should be held until a responsible liquidator abroad came into being to whom the funds might be transmitted, or until recognition of the Soviet Government by the United States of America, or in accordance with any provision of a treaty of the United States (255 N. Y. 415, 421). The Attorney General of the State of New York, appearing in the proceedings on behalf of the State of New York, contended at one time that the surplus should be turned over to the New York comptroller, not on any theory of escheat to the State of New York, but merely for purposes of conservation, until final distribution. The New York Supreme Court at Special Term, and the Appellate Division on appeal (229 A. D. 637) adopted the Superintendent's plan and disposed of the contentions of the State of New York by holding that it would serve no useful purpose to transfer the funds for purposes of conservation from one public official to another. The Court stated that no serious claim to escheat had been asserted by the State. Upon appeal to the Court of Appeals, however, it was held (255 N. Y. 415) in a learned opinion by

Chief Judge Cardozo that the funds had been held long enough by the Superintendent of Insurance and should be made available for payment to creditors and policyholders with claims founded upon foreign business; that foreign claims duly filed or to be filed within a reasonable time should be adjudicated and paid and that the residue, if any, should go to the shareholders and directors; that the administrative machinery of the State of New York should no longer be clogged, its Liquidator no longer burdened and the New York Courts no longer vexed with problems not their own, to wit: the problem of distributing the surplus after payment of all claims both of domestic and foreign creditors.

Following this decision, and the order or decree entered upon the remittitur, it became the duty of the Superintendent of Insurance, as trustee, to recognize and pay foreign claims and turn over the residue, if any, to the directors, all in accordance with the final judgment rendered by the Court of Appeals. These proceedings all took place prior to recognition of the Soviet Government by the United States and prior to the intervention by the United States in these proceedings. The State of New York, and the Superintendent of Insurance of that State, as liquidator and trustee of these funds, are interested solely in seeing that the funds are distributed to the rightful owners thereof as prescribed by the statutes, decrees and orders of its highest court.

POINT ONE.

The writ of certiorari in this case was improvidently granted and should now be dismissed.

The record in the case at bar presents no federal question for review, nor did the record in the *Moscow* case, recently decided by this Court, present any such question. In the case at bar, the decision of the New York Court of Appeals (284 N. Y. 555) (R. 71), affirming a judgment for

the defendant dismissing the complaint on his motion for summary judgment, merely held that there were no issues to be tried; that the previous decision of the New York Court of Appeals in *Moscow Fire Insurance Co. v. Bank of New York* (280 N. Y. 286; affirmed without opinion by this Court in 309 U. S. 624; rehearing denied, 309 U. S. 697), determined the case at bar and left open no question to be argued. The Court held:

"We are agreed that without again considering such questions, this Court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here."

The New York Supreme Court, in a short decision by the Special Term Justice (R. 52), had theretofore granted summary judgment on the authority of the decision in the *Moscow* case. The New York Appellate Division affirmed without opinion (259 A. D. 871). It appears from these decisions in the case at bar that a Special Term Justice, five justices of the Appellate Division, and seven Judges of the Court of Appeals, unanimously found that under the applicable provisions of the Rules of Civil Practice (Rule 113), there were no issues to be tried in this case, and that judgment should properly be for the defendant.

Respondent challenges the appellant to point out where any federal questions are raised in the record at bar. The claim asserted by plaintiff herein is predicated solely upon Soviet decrees (Complaint, Pars. 8, 9, 10; R. 23, 24) and is not based on any treaty or federal law. There is no question here as to the validity of a treaty or statute of the United States or the validity of any State statute as being repugnant to the Constitution, treaties or laws of the United States. Nor is there involved here any right, title, privilege or immunity under the Constitution or any treaty or statute of the United States, or commission held

or authority exercised under, the United States within the meaning of Section 237(b) of the Judicial Code. The sole question decided in the *Moscow* case and applied in the case at bar upon the same questions of fact and law was that these Soviet decrees did not pass title extraterritorially to assets always situate in New York, belonging to the Domesticated United States Branch of the First Russian Insurance Company, a separate and distinct entity under New York law; that New York law governed and that foreign creditors have been given vested rights in these assets. Neither the Government's petition for writ of certiorari, nor its brief herein, show any specific federal law, constitutional provision or treaty upon which its contentions are founded. Analysis of the moving and opposing affidavits is more fully set forth in Point Two of this brief. Suffice it to state that the sole opposing affidavit of the Government raised no federal issue and, as a matter of fact, raised no issue whatsoever, *but merely requested the Court to hold the decision in abeyance pending a determination of the Moscow case by this honorable Court* (R. 50-51).

Respondent submits that if the Government must rely upon the *Moscow* case in support of its contention that a federal question is presented for review herein, we respectfully assert that no federal question was properly presented for review by this Court even in that case. The appellant in this case must, of course, concede that a federal question is not presented merely because plaintiff is the sovereign. That its claim rests solely on the title by assignment from the Soviet Government, and has no added force and effect because it is being asserted by the United States as assignee, was determined by this Court in the *Belmont* case and in the *Guaranty Trust Co.* case, *supra*.

Mr. Justice Stone, in his opinion in the *Belmont* case, held as follows:

"It seems plain that, so far as now appears, the United States does not stand in any better position

with respect to the assigned claim than did its assignor, or any other transferee or the Soviet Government. . . .

"There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor, or that the President, by mere executive action, purported or intended to alter the laws and policy of any state in which the debtor of an assigned claim might reside, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity with those laws. Cf. *Todok v. Union State Bank*, 281 U. S. 449, 50 S. Ct. 363, 74 L. Ed. 956."

In *Guaranty Trust Co. of New York v. United States*, *supra* (304 U. S. 126, at p. 143), Mr. Justice Stone made the same finding in the same language.

Since the plaintiff's title in the case at bar was derived solely from certain decrees promulgated by the plaintiff's predecessor-assignor, and the New York State Court has held that these decrees have no application to the property located in New York, this holding construing the New York Insurance Law is a separate, independent, adequate non-federal ground of decision which precludes review by this Court.

Because of the lengthy briefs being submitted to this honorable Court in the case at bar, and so as to shorten the within brief, the respondent respectfully calls the attention of this Court to an excellent discussion and full citation of cases on this subject in the *amicus curiae* brief on behalf of respondents Kentman, Gartoung, and others, filed by Osmond K. Fraenkel, as counsel in the *Moscow* case (No. 355, October, 1939 Term of this Court).

POINT TWO.

Summary Judgment in Favor of the Defendant Was Properly Granted by the New York Courts Under Rule 113 of the Rules of Civil Practice and the Decisions Construing This Rule.

The complaint in this action (R. 19-36d) was identical in substance and sought the same relief which the Government had unsuccessfully asserted in its petition in the *Moscow* case. The answer of the defendant Louis H. Pink, Superintendent of Insurance (R. 37-49) set up the same defenses as had been successfully asserted and sustained by the defendants in the *Moscow* case. The complaint was verified on November 16, 1937, and the answer on March 28, 1938. The issues were left in *status quo* pending the decision by the New York Court of Appeals and by this honorable Court in the *Moscow* case, which all parties believed would be determinative of the questions at bar. When the New York Court of Appeals (in 280 N. Y. 286) decided the *Moscow* case, the Superintendent of Insurance, as trustee of the fund, desirous of terminating the litigation, closing the proceedings and paying the funds to their rightful owners, and being of the opinion that the *Moscow* case terminated once and for all the claims of the United States Government as to these funds, moved at Special Term, Part III, of the Supreme Court, New York County for summary judgment under Rule 113 of the Rules of Civil Practice and Section 476 of the Civil Practice Act, "on the ground that there is no merit to the action and that it is insufficient in law." (Rule 113 and Section 476 are annexed to this brief as Appendix A for the convenience of this Court.)

That the New York Supreme Court at Special Term, Part III, where the motion was originally addressed and the New York Appellate Courts granted judgment for the defendant upon the basis of Rule 113 and not upon Section 476, appears very plainly from the orders and decisions in the

case at bar. The Special Term Justice (R. 52) stated in his memorandum decision:

"Motion for summary judgment dismissing the complaint is granted (*Moscow Fire Ins. Co. v. N. Y. Bank & Trust Co.*, 280 N. Y. 286) * * *".

The ordering clauses in the order entered by the Special Term Justice upon the motion read as follows, (R. 6 and 7):

"ORDERED, that the motion herein for an order *dismissing the complaint and awarding summary judgment* in favor of the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company Established in 1827, *pursuant to Rule 113 of the Rules of Civil Practice*, be and the same hereby is in all respects granted, *and the said complaint be and the same hereby is dismissed on the merits*; and it is hereby further

ORDERED, that the judgment herein be entered in favor of the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company Established in 1827, against the plaintiff, United States of America, *dismissing the complaint herein on the merits*, together with the costs of this action to be taxed by the Clerk, and that said judgment be entered by the Clerk of the Court without further order." (Italics ours.)

The judgment entered in the Supreme Court (R. 9) provides for a dismissal of the complaint *upon the merits*. The order entered on the remittitur following affirmance by the Appellate Division and Court of Appeals provided that the complaint is dismissed *on the merits* (R. 67). It is quite patent from the record that the New York Courts granted summary judgment for the defendant under Rule 113 rather than under Section 476 of the New York Civil Practice Act.

Rule 113 was originally based on the English Practice Act, Order 3, Rule 6, and Order 14, Rule 1. (*Comm. Credit Corp. v. Podhorzer*, 221 A. D. 644, 224 N. Y. S. 505; *Norwich Pharm. Co. v. Barrett*, 205 A. D. 749, 200 N. Y. S. 298). As interpreted by the courts of New York, it has been consistently held that the rule should be given a broad, liberal construction, since it is remedial in nature and designed to improve and make more efficient the administration of justice. (*Pross v. Foundation Properties*, 158 Misc. 304, 285 N. Y. S. 796; *Levine v. Behn* (1938) 169 Misc. 601, 605, 608, 8 N. Y. S. (2d) 58 (rev'd on other grounds 282 N. Y. 120); *Reddy v. Zurich G. A. & L. I. Co.*, 171 Misc. 69, 111 N. Y. S. (2d) 88). The rule was designed to prevent delaying of judgment by a denial good on its face but without actual support in fact (*Continental Securities Co. v. Interb. R. T. Co.*, 118 Misc. 11, 193 N. Y. S. 892, aff'd 200 A. D. 794) and offered relief to defendants as well as plaintiffs. The history of the rule shows it substantially to be the same as Section 57 of the New Jersey Practice Act. (P. L. 1912, pp. 394, 395).

In a recent case decided by the Second Circuit Court of Appeals (*Banco De España v. Federal Reserve Bank*, 114 F. (2d) 438, 445) (summary judgment having been adopted in Rule 56 of the Federal Rules of Civil Procedure), Judge Clark made the following pertinent observation concerning motions for summary judgment:

"These rulings but serve to show that the Courts look through the form to the substance of the matter presented and that the real requirement is of proof which if presented at a formal trial would be competent to support the issues to which it is directed."

Under the rule the court does not try the issue but ascertains whether, in fact, there is one to be tried (*Hanna v. Mitchell*, 202 A. D. 504, 196 N. Y. S. 43); and its object was to separate what is formal or pretended from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial (*Richard v. Credit Suisse*, 242 N. Y. 346; *McAnsh v. Blauner*, 222 A. D. 381). The accepted purpose of the rule was to expedite litigation

and do away with sham issues, thus obviating any delays and expense of trial. Such was the English rule from which Rule 113 derives its origin (*Roberts* (1895), 1 Q. B. 597, C. A.; *Nassau Press*, 70 L. T. 376; *Ex parte Spelman* (1895), 2 Q. B. 176).

The plaintiff contends that summary judgment was improperly granted since: (1) under Section 476, the allegations of the complaint are deemed to be admitted and, thus, factual issues are presented for trial; and (2) that the Superintendent, if he relied upon Rule 113, must have based his application on that portion of said rule which relies upon documentary evidence or official record.

As to the first contention, it is respectfully submitted that the Superintendent did not rely upon Section 476 of the Civil Practice Act, which is based solely upon the pleadings and does not permit consideration of supporting or opposing affidavits - (*Velsor v. Freeman*, 118 Misc. 276; *Arverne Bay Constr. Co. v. Thatcher*, 250 App. Div. 482) but that he relied upon Rule 113 and his affidavit in support of the motion (R. 10, 12, 17), showing that there were no issues of fact or law to be tried. What did the plaintiff offer in rebuttal and in support of its complaint? The sole opposition to the Superintendent's motion is a two-page affidavit of Leon E. Spencer, an Assistant United States Attorney for the Southern District of New York, in charge of the Government's case (R. 50, 51). *In it no facts are set up to show the presence of any issues to be tried.* The affiant merely shows that since the decision of the Court of Appeals in the *Moscow* case, the Solicitor General of the United States has decided that an application for certiorari will be filed in due time in the United States Supreme Court seeking a review of this determination. Since, therefore, as he states, the decision of the Court of Appeals has not yet become final and will remain interlocutory until this Court passes upon the application for certiorari and then renders its decision in the case, he concluded:

"It is therefore respectfully submitted that the motion made on behalf of the Superintendent of In-

insurance for the dismissal of the Government's complaint in the above entitled action is premature and should be denied or else decision thereon withheld pending the final decision of the Supreme Court in the Moscow Fire Insurance Company case decision, in which case the Superintendent of Insurance alleges as his authority for the dismissal of the complaint herein."

It is quite patent from the record at bar that the Government conceded that there were no issues involved in this case, and that if the *Moscow* case were affirmed by this Court, relief must be denied to the United States in the *First Russian Insurance Company* case then pending. It now contends that since a decision by an equally divided court is merely *res judicata* between the parties and not *stare decisis*, it should be given an opportunity to re-litigate the entire question in the courts of New York, although foreign creditors, whose rights are affected by the Government's intervention, have been waiting patiently since 1917 for payment of their claims, and although in 1931, the New York Court of Appeals, prior to recognition of Russia and prior to the intervention in these proceedings by the United States, held that they had rights and should be paid. There must be an end to litigation sometime. This principle underlies Rule 113. Over 2,000 pages of testimony and hundreds of exhibits, exclusive of the various orders, decrees and motion papers, constituting three huge volumes, make up the record in the *Moscow* case. Upon all these facts it was fitting and proper for the New York courts to have ended this litigation and to have granted summary judgment upon the Superintendent's application.

On pages 2 and 3 of the Government's petition for a writ of certiorari herein, the following statement appears:

"The precise question here involved was before this Court in *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624, where the decision of the Court of Appeals of New York (280 N. Y. 286), upon which the decision in the instant case is rested, was

confirmed by an equally divided court. The only difference between the two cases is that in the Moscow cases, in which evidence was taken, there was an adverse decision below on a question of foreign law. * * *

The question as to what portion of Rule 113 the Superintendent relied upon is not material, nor is the form of the documents or official evidence important. It was perfectly proper for the Court to examine, if it saw fit, the entire Moscow record or any portion thereof. It held, however, (284 N. Y. 555) that

"The judgment appealed from is in accord with the decision of this Court in *Moscow Fire Insurance Company v. Bank of New York* (280 N. Y. 286, aff'd., without opinion by an equally divided Court, 309 U. S. 624; rehearing denied, 309 U. S. 697). Three of the judges of this Court concurred in a forceful opinion dissenting from the Court's decision in that case, but the decision left open no question which has been argued upon this appeal. We are agreed that without again considering such questions, this Court should, in determining title to assets of First Russian Insurance Company deposited in this State, apply in this case the same rules of law which the Court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here."

In the Government's reply brief before the New York Court of Appeals in the case at bar, we find the following interesting conclusion on page 8:

"Plaintiff-appellant realizes that despite the division of this Court in the *Moscow* case and the participation in the present appeal of Judges who were not then on the Court, the natural inclination of this Court would be to abide by its prior decision, and let the United States Supreme Court reverse if reversal is to be. One consideration is relevant to this matter that has not already been called to the attention of the Court. The so-called 'separate-

entity' theory is in its most obvious aspect a question of state law. While the appellant believes that in the circumstances of this case and of the *Moscow* case, that question is reviewable by the Supreme Court as a necessary incident of the decision of federal questions, the possible existence of an 'independent state ground' may obscure the otherwise clear cut issues presented for review by the Supreme Court. If a majority of this Court entertain grave doubts upon the validity of that theory, the question is therefore more fittingly reconsidered in this Court than in the Supreme Court of the United States."

Here we have practically a concession that the question is one for the state court to decide. In the same breath, however, the Government concludes that it would be the natural inclination of the state court to abide by its prior decision "and let the United States Supreme Court reverse if reversal is to be." The position of the Government in the case at bar is most inconsistent, to say the least.

Additional citations in support of the summary judgment granted below may be found in Points I and II of the *amicus curiae* brief being submitted to this honorable Court on behalf of the surviving directors by their counsel, Paul C. Whipp and Lounsbury D. Bates. One quotation, in particular, sums up the case at bar:

"One trial of an issue is enough (*Treinic v. Sunshine Mining Co.*, 308 U. S. 66, 78; *Baldwin v. Traveling Men's Association*, 283 U. S. 522, 525)."

The interpretations of the New York Rules of Practice and Civil Practice Act are matters solely for the New York Courts to decide. This Court will follow the decision and interpretation placed upon such rules by the highest Court of New York State. (*Neblett v. Carpenter*, 305 U. S. 297, 302; *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78; *Bacon & Sons vs. Martin*, 305 U. S. 380, 381; *Schuykill Trust Co. v. Penn.*, 302 U. S. 506, 512.)

Appellant has not and cannot show, that the facts in this case differ in any respect from those adduced at the trial in the *Moscow* case. It would be futile, therefore, to remit this case for trial.

POINT THREE.

The decision in the *Moscow* case (280 N. Y. 286; affirmed 309 U. S. 624; rehearing denied 309 U. S. 697), was correct in all respects.

Throughout appellant's brief, it is repeatedly contended that the basis of the decision of the New York Court of Appeals in the *Moscow* case, as affirmed by this Court, was "intended to be and must have been the view that the Soviet decrees because of their confiscatory character are contrary to the local public policy. No other interpretation adequately explains the conclusion reached." This statement appears many times throughout the brief, although it was never so held by the New York Court of Appeals, and the opinion of Judge Lehman (Appendix A, annexed to appellant's brief) clearly shows that these statements have no foundation whatsoever. Judge Lehman held that in spite of the public policy of this State, and in spite of all conceptions "rooted in our age-old common law traditions of ordered liberty," it was incumbent upon our courts after recognition of the Soviet Government to recognize its decrees even though they were confiscatory and repugnant to all principles and traditions of the common law. Our Courts, however, could construe the decrees and determine their effect if any, on property situate in New York. At page 314 of the decision (R. 108, 109), Judge Lehman concluded as follows:

"The courts below have made the proper choice, not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public

policy, but because under the law of this State such confiscatory decrees do not affect the property claimed here."

Briefly stated, the Court of Appeals' decision in the *Moscow* case, as affirmed by this Court, was based upon the following grounds:

(1) That the Soviet decrees were either not intended to affect or, if so intended, could not have affected extra-territorially the property and assets in New York State of the domesticated United States branch established here in 1907. The voluminous testimony and evidence in the *Moscow* proceeding amply supported the holding to this effect by the referee and by the courts below, the foreign law being under the New York procedure a question of fact to be established as such upon the trial. The effect of such decrees as respects property situated in the State of New York must be interpreted under the New York law;

(2) Under the statutes and decisions of the New York courts, the United States branch is a separate domestic corporation, apart and distinct from the corporation at the domicile, and its assets are not subject to transfer or other disposition by the home office.

(3) The liquidation proceedings in New York were proceedings *in rem* over which the New York courts had sole and exclusive jurisdiction. By the decision of the Court of Appeals in *Matter of People (First Russian Insurance Co.)*, 255 N. Y. 415, foreign creditors were invited into the proceedings and given vested rights in the surplus assets, all prior to the assignment and so-called treaty by the Soviet Government to the United States. Having proceeded diligently to enforce such rights in the courts of this state, the claims of such creditors may not be dismissed in favor of the Government's claim. The previous orders and decrees allowing and directing payment of foreign claims, duly

entered by the New York Courts may not be nullified and set aside.

As to subdivision (1) hereinabove, respondent will not burden this Court with a lengthy discussion of the facts and law established in the *Moscow* case. The learned opinion of Judge Lehman in that case (Government's brief herein, Appendix A, pp. 86-109) and the briefs filed with this honorable Court on the argument (309 U. S. 624) leave nothing unsaid, and respondent respectfully refers herein to said opinion in toto and to such briefs and invites the attention of this Court thereto.

As to subdivision (2), the opinion of Judge Lehman gives the history and statute and decision law appertaining to the separate entity of the domesticated United States branch. An historical review of this subject is set forth in the Superintendent's first report in this proceeding (found in Case on Appeal, 255 N. Y. 415). For the convenience of this Court this portion of the Superintendent's report is annexed to this brief as Appendix B.

As to subdivision (3), this Court has held, and appellant must concede, that the liquidation proceedings are *in rem* (*United States v. Belmont*, 301 U. S. 324); *United States v. Bank of New York & Trust Co.*, 296 U. S. 463; *Banco de Espana v. Federal Reserve Bank*, 114 F. (2d) 438, 442; *Sullivan v. The State of Sao Paulo* (Second Circuit Court of Appeals, 122 Fed. (2nd) 355, decided August 4th, 1941).

Mr. Justice Stone in the *Belmont* case, at page 335, stated:

"But it is a recognized rule that a state may rightly refuse to give effect to external transfers of property within its borders so far as they would operate to exclude creditors suing in its courts. (citing cases) * * *

"In conformity to this doctrine, New York would have been free to enforce a local policy, subordinating the Soviet Government, as the successor of its national, to local suitors. Its judicial decisions

indicate that such may be its policy for the protection of creditors or others claiming an interest in the sum due. (citing cases) ”

Mr. Justice Stone at page 335, further held that the United States was in no better position than its assignor and that the Government obtained no greater rights nor did the treaty purport or intend to alter the laws and policy of any state in which the debtor of an assigned claim might reside (in this case, New York). Therefore, that the United States, as assignee of the Soviet, could collect only in conformity with the New York laws. (Mr. Justice Brandeis and Mr. Justice Cardozo concurred in this separate opinion; there was no dissenting opinion by any member of this Court.)

In *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, Chief Justice Hughes, commencing at page 475, discussed at length and in detail the First Russian Insurance Company situation, concluding in a forceful statement of the law that the New York courts took jurisdiction of the *res*; that the proceeding was one *in rem*, and the fund at all times subject to New York courts' control. When the domestic creditors were paid, Chief Justice Hughes said that it did not follow that the remaining assets were automatically released and the state court shorn of its jurisdiction. The state court still had control and pertinent equitable jurisdiction to decide what should be done with the fund. Justice Hughes summed up the situation in the following language:

“In No. 197 (the First Russian situation) the Superintendent still holds possession by virtue of that authorization and the *res* thus remains under the court's jurisdiction” (parenthesis ours).

Without deciding the case on the merits, the United States was denied relief in the federal court and was remitted to the state court proceedings.

The case at bar does not involve any question of a refusal by the State of New York or its courts to recognize the sovereignty and the paramount rights of the United States Government as such. There exists no such conflict in this case, although appellant throughout its brief endeavors to becloud the issues by arguing to this Court that the State of New York, its courts, and the Superintendent of Insurance are asserting rights in contravention to the rights of the sovereign. No extended argument is necessary to convince this honorable Court that there is no such issue in the case at bar. The New York courts and the Superintendent of Insurance, as Liquidator, recognize the exclusive right of the executive branch of the Government to decide political as opposed to judicial questions. We have no political question in the case at bar. An interesting and recent discussion of this subject may be found in the opinion of Circuit Judge Clark in *Sullivan v. The State of Sao Paulo*, *supra*, recently decided on August 4, 1941. After making the foregoing holding, Judge Clark continued as follows:

"The adjudication of present rights to property within a court's jurisdiction is, however, a purely judicial function, which no executive department of the government is constitutionally or practically equipped to discharge (*Banco de Espana v. Federal Reserve Bank*, *supra*). Every court has the general power to pass on questions affecting its own jurisdiction (*Stoll v. Gottlieb*, 305 U. S. 165, 59 S. Ct., 134, 83 L. Ed., 104), and where that jurisdiction is in rem or quasi in rem, as based upon property in its control, no executive action can deprive the court of jurisdiction—or even constitute evidence of rights in the property—except in so far as such rights depend on the settlement of 'political' questions, as on issues of sovereignty of a party or his assignor (*United States v. Bank of N. Y. & Trust Co.*, 296 U. S. 463, 56 S. Ct., 343, 80 L. Ed., 331; *Berizzi Bros. Co. v. SS. Pesaro*, 271 U. S. 562, 46 S. Ct., 611, 70 L. Ed., 1088; see *United States v. Belmont*, 301 U. S. 324, 57 S. Ct., 758, 81 L. Ed., 1134)."

The final order entered in the liquidation proceedings pursuant to the decision of the Court of Appeals in 255 N. Y. 415, is binding upon the world and forecloses any interest of the Soviet Government or its assignee, the United States Government. The underlying purpose of an action *in rem* is founded upon public policy and based upon the interest of the state that there should be a definite end at some time to litigation. The language of Judge Cardozo in 255 N. Y. 415 clearly shows how firmly this proposition of law was imbedded in the mind of the court.

This Court in *Stoll v. Gottlieb*, 305 U. S. 165, 172, said:

"Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as there should be a place to begin litigation."

Surely it may not be contended that the United States Government, as assignee, may impeach or set aside the final orders or judgments of the New York courts in proceedings *in rem*, made and entered prior to the assertion of any rights by the United States Government as assignee.

The *Belmont* case before this Court, and *United States v. Manhattan Co.*, (276 N. Y. 396), referred to many times, offer no solace to the Government in the case at bar. Both cases came up for review before the higher courts on motions which, under applicable statutes, deemed as admitted the allegations of the complaint. Nothing was decided on the merits and, indeed, the opinions in the *Belmont* case support respondent's contentions rather than those of appellant. If *U. S. v. Manhattan Co.*, nevertheless, relied upon by the appellant, suffice it to point out that the subsequent opinion of the Court of Appeals in the *Moscow* case (280 N. Y. 286) controls.

The funds while deposited with the trustee primarily for the benefit of United States creditors and policyholders of the Company, were received for the benefit of all its policyholders, creditors and stockholders wherever they might be (*Matter of People (City Equitable Fire Ins. Co.)*, 238 N. Y. 147, 156; *Matter of People (Norske Lloyd Ins. Co.)*, 242

N. Y. 148, 165.) Under normal conditions, and where a domiciliary receiver or liquidator existed at the domicile in a country recognized by us, the surplus assets would have been transmitted there for distribution to the rightful owners. The Russian liquidation proceedings presented a unique situation, described by Judge Cardozo in 255 N. Y. 415. There was no recognized government nor was there a liquidator or receiver at the domicile to whom the funds might be sent for distribution. Judge Cardozo (in 255 N. Y.) and Judge Lehman, in the *Moscow* case, (280 N. Y.) held that the result of the Russian decrees upon the liquidation proceedings here presented "a tangle of juristic rights and obligations which cannot be unravelled by a strict logical application of juristic concepts The situation is not only without precedent but anomalous and there can be no true precedent in the books, when the facts are unprecedented."

The New York court held that it might either hold the funds in accordance with the Superintendent's plan, or might in the exercise of its broad powers, provide in the extraordinary condition then prevailing, an extraordinary method of administering and distributing the assets then in the control and custody of the state. The latter course was chosen. Judge Cardozo, referring to these foreign claimants whose proofs of claim were filed and diligently pressed while the Superintendent was in charge and the injunction still in force, said 255 N. Y. p. 423:

"The creditors so proving were acting in response to a published invitation, published in accordance with the order of liquidation, to submit claims of every kind without reference to the place of origin, and were stayed in the meantime from a remedy in the courts. There would be manifest inequity if at this late day an ancillary receiver were to remit them to their legal remedies and thus compel them to prove anew" (citing authorities).

The court found it just and proper to direct the liquidator here to adjudicate all claims filed with him. In protecting

creditors and shareholders the New York courts were merely carrying out the purpose of the statutory trust created under the New York law and were acting in accordance with just and equitable principles.

The United States in pressing its claim as suitor cannot ask to be relieved from the position which an ordinary suitor occupies merely because it is a sovereign. It is bound by the public policy of the State of New York and by that of the nation in the same manner as private litigants. (*Standard Oil Co. v. United States*, 267 U. S. 76, 79; *United States v. The Thekla*, 266 id. 328, 339; *Folk v. United States*, 233 Fed. 177, 192; *United States v. Midway Northern Oil Co.*, 232 id. 619, 631.)

The learned referee, in his decision in the *Moscow Fire Insurance Co.* case (161 Misc. 903; aff'd 280 N. Y. 286; 309 U. S. 624), at page 918, held as follows:

"The actual situs of the surplus having been in a depository within this State either with trust companies under the Insurance Law or the defendant bank by court order, this conferred upon the courts of this State full dominion over such deposit, held, as it was, by law or order of our courts. (*Clark v. Williard*, 294 U. S. 211, 214; 292 id. 112, 123; *City Bank v. Schnader*, 293 id. 112, 118; *Pennington v. Fourth National Bank*, 243 id. 269, 271; *Spencer v. Myers*, 150 N. Y. 269; *Vladikavkazsky Railway Co. v. New York Trust Co.*, 263 id. 369; *Petrogradsky M. K. Bank v. National City Bank*, 253 id. 23.)

"The intervening claimant must submit to the mandate of the municipal law that has the physical control of that which it would reduce to its possession. (*Clark v. Williard*, *supra*.) The question who is the owner of the claim depends for its answer upon the law of the place where the securities or deposit are located. (*Burnet v. Brooks*, 288 U. S. 378.)

"The deposit here in question was created by New York law (Insurance Law, § 27). The surplus was created by the same law (Insurance Law, § 63). It was invested in domestic securities.

"Normally, at the end of domestic liquidation the surplus would have been remitted to a domiciliary re-

ceiver. (Matter of People (Norske Lloyd Ins. Co.), 242 N. Y. 148; Matter of People (City Equitable Fire Ins. Co.), 238 id. 147; Matter of People (Russian Reinsurance Co.), 255 id. 415; Matter of People (Moscow Fire Ins. Co.), Id. 432.) Solely because of the fact that Russia was not recognized in 1931 when the funds would normally have been transmitted, such remission could not take place, and this surplus left over after the domestic liquidation was directed to be disposed of here. (Matter of People (Russian Reinsurance Co.), 255 N. Y. 415; Matter of People (Moscow Fire Ins. Co.), Id. 432; Matter of People (First Russian Ins. Co.), Id. 415.)"

In *Clark v. Williard*, 294 U. S. 211, at p. 214, referring to the title of a foreign statutory successor of a dissolved foreign corporation, this Court said:

"He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession."

The enforcement by the Courts of New York of foreign laws and decrees affecting property here may not be demanded as a matter of right. The effect if permitted at all, is only because of the comity which exists between states and nations. This comity will not be extended if intervening rights of citizens, or foreigners coming into our courts, have been established by rules or decisions of our local courts. Each state has the power to determine for itself the conditions upon which property situated within its territory, both personal and real, may be acquired, enjoyed and transferred.

It cannot be disputed that rights which have been acquired here in New York in and to property situate in New York will be protected by the New York courts, and by this court whether they belong to non-residents of the State of New York or foreigners or inhere in its own citizens or residents. (*Barth v. Backus*, 140 N. Y. 230; *Matter of People (Norske Lloyd Ins. Co.) supra*; *United States Constitution, Fifth Amendment and Fourteenth Amendment*; *Russian Volunteer Fleet v. U. S.*, 282 U. S. 481, 491, 492).

Conclusion

As far as this record discloses, even without the analysis made by the Superintendent as to the present status of the fund (footnote, p. 6, *supra*) there is and will be no surplus after paying the adjudicated and already filed claims of foreign creditors with interest and the attachment claims in suit. There are no claims of shareholders in this proceeding, and, as far as the surviving directors are concerned, their only interest could be to see that all creditors, both domestic and foreign, receive just treatment and payment of just claims. When this is accomplished there will be no residuum which, ordinarily, would be transferable to the domiciliary liquidator or to a quorum of the board of directors (255 N. Y. 415).

The respondent at bar, as trustee of the fund, charged with the duty of distributing it to its rightful owners, respectfully submits that the writ of certiorari should be dismissed because improvidently granted, or, if not dismissed, that the judgment below should be affirmed, so that the claims of creditors with vested rights already adjudicated by the New York courts may be paid without further delay, and the Superintendent of Insurance, as liquidator and trustee, may bring to an end the liquidation proceedings now pending over sixteen years in the courts of the State of New York.

Respectfully submitted,

ALFRED C. BENNETT,

*Counsel to the Superintendent of Insurance
of the State of New York, as Liquidator
of the Domesticated United States
Branch of The First Russian Insurance
Company, Established in 1827, Re-
spondent.*

December, 1941.

Appendix A

NEW YORK CIVIL PRACTICE ACT

§ 476. JUDGMENT ON PLEADINGS OR ADMISSION OF PART OF CAUSE. Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require. (New. See Code § 511, in part; § 547.)

NEW YORK RULES OF CIVIL PRACTICE

RULE 113—SUMMARY JUDGMENT. When an answer is served in an action.

1. To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

2. To recover a debt or liquidated demand arising on a judgment for a stated sum; or

3. On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

4. To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed, other than for breach of promise to marry; or

5. To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

6. To enforce or foreclose a lien or mortgage; or

7. For specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the case may require; or

8. For an accounting arising on a written contract, sealed or not sealed.

The complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues. If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.

If the plaintiff or defendant in any action set forth in subdivisions 3, 4 or 5 hereunder shall fail to show such facts as may be deemed, by the judge hearing the motion, to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the court alone, or by the court and a jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any actions in cases set forth in subdivisions 6, 7 and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions. (As amended March 14, 1932, and May 11, 1933; in effect June 15, 1933.)

Appendix B

Extract from Superintendent's First Report, Audit and Petition dated August 11th, 1927, filed in New York Supreme Court on August 18th, 1927 and part of record in 255 N. Y. 415.

The Public Acts, Statutes, Laws and Public Policy of the State of New York Under Which the Domesticated United States Branch Was Established, Transacted Business and Is Now Being Liquidated.

Upon information and belief, the State of New York under the Constitution of the United States and under its own Constitution, is endowed with governmental functions and sovereign duties adequate to supervise, regulate and control in all of its forms and manifestations, the business of insurance and any or all persons, firms, corporations, or other entities engaged, attempting to engage or seeking to engage or representing an engagement therein. That the State first exercised its said reserved power in respect of insurance supervision, regulation and control in or about the year 1814, when it commenced the supervision, regulation and control of the business of insurance and persons, firms, associations, corporations and other entities engaged or attempting to engage or representing that they were engaged or intended to engage in such business within the jurisdiction of the State. Said supervision, regulation and control was, on the 6th day of December, 1894, continued, when the State adopted and promulgated a new and revised Constitution under which it again reserved and retained unto itself the power to continue such supervision, regulation and control. Since the adoption of its Constitution of 1894, the State has from time to time enacted public acts, statutes and laws for the supervision, regulation and control of the business of insurance and of all individuals, firms, corporations and other entities engaged, attempting to engage or representing that they were engaged or in-

tended to engage therein, and particularly reference is here made to Chapter 28 of the Consolidated Laws, being Chapter 33 of the Laws of 1909, and the amendments thereto, all of which at all the times hereinafter mentioned have remained in full force and effect and have been administered by the State within its jurisdiction. Said supervision, regulation, control and public policy evidenced by such public acts, statutes and laws, comprehends and extends from the creation, organization, incorporation and admitting of persons, corporations and other entities engaged or intending to engage in such business, through their entire continuance in the business, and to and including the dissolution, forfeiture and annulment of their charters, licenses or authorities granted, the fixing, ascertaining and determining of their assets and liabilities and the distribution of their property and assets in cases of insolvencies or other delinquencies, as more fully shown by said public acts, statutes, laws and the judicial and administrative decisions of the various governmental departments of said State and particularly by Chapter 28 of the Consolidated Laws, being Chapter 33 of the Laws of 1909, and the amendments thereof to date. In particular the public acts, statutes, laws and public policy of the State of New York at all the times hereinafter mentioned provided that any alien insurance corporation or other insurer of or organized and existing under the laws of any recognized foreign country may do business within the State of New York the same as a domestic corporation or other insurer, provided any such alien foreign insurance company or other insurer would first establish and erect a domesticated United States Branch to be in law and in fact in the State of New York, and in other states of the United States under reciprocal laws, a domestic corporation or insurer of the State of New York with the same charter, powers, rights and responsibilities that a domestic corporation or other insurer of the same kind and class would have; that such a domesticated United States Branch must be a separate and distinct corporation

from its creator; that its assets, property and liabilities incurred by reason of its New York domestication and its transaction of business within the jurisdiction of New York and elsewhere in the United States would be separate, distinct and apart from the creating corporation and that the business and affairs of the creating corporation in foreign countries would bear no relation to nor have any effect upon the business or affairs of the domesticated United States Branch; that in case its domesticated United States Branch should become delinquent, insolvent, hazardous or otherwise incapacitated to function as a domestic corporation, or in case the creating corporation should become insolvent, delinquent or hazardous, or placed in the hands of a receiver or had its property sequestered in its domiciliary state or country or in any other state or country, the domesticated United States Branch would become subject to liquidation by the state, the same as if it were a domestic corporation and that in case any such liquidation should take effect, the surplus funds arising after payment of all debts and liabilities incurred by the domesticated United States Branch in the transaction of its business would be transmitted by the State to the legal representative of the creating corporation at its domicile, as more fully shown by the provisions of Chapter 28 of the Consolidated Laws, being Chapter 33 of the Laws of 1909, and the amendments thereto, as construed by the executive, judicial and legislative divisions of the Government of the State of New York..

For the purpose and with the intent of executing, enforcing and administering its said public policy in relation to the business of insurance and its public acts, statutes, and laws concerning the same, the State erected and established and has ever since maintained and still maintains a separate department in its State Government, which separate department is known as the "Insurance Department", and which said State has endowed with powers and authority adequate to administer its public acts, statutes, laws

and the public policy of the State with reference to the business of insurance and all persons and other entities engaged or attempting to engage or representing that they are engaged or intend to engage therein.

By the aforesaid public acts, statutes, laws and public policy of the State of New York, the state offered to exercise its governmental functions and sovereign duties reserved under its police powers, in such a way that said public acts, statutes, laws and public policy would be carried out in good faith for the protection of any qualified alien foreign insurer of a recognized nation that would accept the terms and conditions of such offer and in pursuance thereto establish a domesticated United States Branch and furnish to the people of the State of New York and of other states of the United States under reciprocal laws, insurance facilities. The State represented that in the event of a delinquency or failure of any such domesticated United States Branch or by reason of the insolvency, delinquency or hazardous condition of the creating corporation or if the creating corporation should be placed in the hands of a receiver or should have its property sequestrated in its domiciliary state or country or any other state or country, it would, through its Insurance Department, liquidate such a domesticated United States Branch and after paying all creditors and policyholders thereof and the expenses of liquidation, remit to the alien foreign creating corporation or its legal representative at its domicile the surplus remaining at the conclusion of such a proceeding.

The said offer of the State of New York ran not only to any alien foreign insurance corporation or other insuring entity that might accept the same, but under international law it ran to and inured in favor of the nationals of all foreign countries whose governments are recognized by the Government of the United States of America and who might deal with said alien foreign insurance corporation or its domesticated United States Branch or who might be affected by the acceptance of the offer of the State of

New York. The acceptance of the offer by an alien foreign insurance entity gave to the nationals of foreign countries whose governments were recognized by the United States Government the right, under the laws of nations, to rely upon the good faith of the State of New York and its officers and the various divisions of its State Government in carrying out the terms and provisions of such offer, and in remitting to the creating corporation or its legal representative at its domicile all surplus funds remaining after paying all debts and expenses of liquidating the domesticated United States Branch, there to be distributed to the nationals of all countries under international law which applies in such cases the equitable principle that equality is equity among the interested nationals of all civilized governments. *Matter of People (Norske Lloyd Ins. Co. Ltd.)* 242 N. Y. 148; *Canada Sou. Ry. Co. v. Gebhard*, 109 U. S. 527; *Martine v. International L. Ins. Soc.*, 53 N. Y. 339; *Virginia v. United Cigarette Co. Ltd.*, 119 Va. 447. The said public acts, statutes, laws and public policy of the State of New York were at all the times hereinafter mentioned municipal public acts, statutes, laws and public policy of the State of New York regularly and duly promulgated, adopted and administered. That they were and still are obligatory and binding upon the State of New York and the Government of the United States under its Constitution, its national laws and under international law recognized by the Government of the United States, and said public acts, statutes, laws and public policy of the State of New York were at all the times hereinafter mentioned and still are maintained and sustained in full credence, respect, recognition, force and effect before the governments of all foreign nations and states and particularly those recognized by and which in turn recognize the Government of the United States of America.

The Creation of the Domesticated United States Branch.

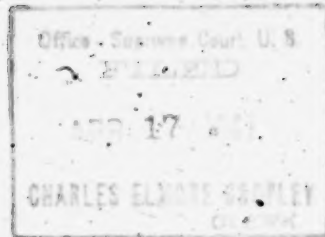
After the State of New York had reserved to itself as a governmental function the sovereign right to supervise, regulate and control in all of its forms and manifestations the business of insurance, and after the State had found that it was necessary to exercise that function for the protection of the commercial wealth, health, happiness and comfort of its people and the people of the United States of America, and while the State was performing for the people the duties resulting from such reserved powers and its finding of a necessity for the exercise thereof, and while its aforesaid public acts, statutes, laws and public policy on the subject were in full force and effect, and while the same were being executed, and administered by the State, the First Russian Insurance Company Established in 1827, of Petrograd, Russia, was in or about the year 1827, organized and incorporated under a statute of the Czar of Russia, whose government was at that time recognized as a friendly government by the Government of the United States of America. Thereafter and in or about the year 1907, and while full recognition of the Government of the Czar of Russia by the Government of the United States was in full force and effect, said First Russian Insurance Company Established in 1827, of Petrograd, Russia, under and pursuant to the aforesaid public acts, statutes, laws and public policy of the State of New York, created and established in the State of New York a domesticated United States Branch which was thereupon authorized by the State of New York to engage in the business of insurance in the State of New York and elsewhere in the United States under reciprocal laws then in force in other states, which extended credence and faith to such a domesticated Branch while existing under the public acts, statutes, laws and public policy of the State of New York.

Transactions Resulting in the Creation and Establishment of the Domesticated United States Branch.

Transactions of the First Russian Insurance Company Established in 1827, of Petrograd, and others which resulted in or contributed to the creation and establishment of the domesticated United States Branch and which are material to a proper consideration and determination of questions presented or which may be presented in this proceeding are fully set forth in the reports of the examiners of the New York Insurance Department, which reports are annexed to or referred to in the moving papers on which the liquidation order in this proceeding was made and granted. Those reports are here made a part of this report the same as if here fully set forth and repeated.

After said domesticated United States Branch was established in 1827, by the aforesaid acts and transactions of the First Russian Insurance Company Established in 1827, of Petrograd, and under the aforesaid circumstances and public acts, statutes, laws and public policy of this state, said domesticated United States Branch immediately commenced business and continued in business until July 13, 1925, when the Superintendent of Insurance of the State of New York, pursuant to said public acts, statutes, laws and public policy of the State of New York, made application to the Supreme Court for an order to take possession of the assets and conserve them for the benefit of the policyholders, creditors, stockholders and the public.

FILE COPY



No. 903-42

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK, AND AS LIQUIDATOR OF THE
DOMESTICATED UNITED STATES BRANCH OF THE FIRST
RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827.

**BRIEF FOR FREDERICK H. CATTLEY,
et al., as Amici Curiae.**

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 903.

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK, AND AS LIQUIDATOR OF THE
DOMESTICATED UNITED STATES BRANCH OF THE FIRST
RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827.

**BRIEF FOR FREDERICK H. CATTLEY,
et al., as Amici Curiae.**

This brief is filed by agreement executed April 3, 1941 under Rule 27(9) on behalf of Frederick H. Cattley, Robert Cattley, John H. Cattley, Thomas F. Cattley, Kenneth M. Cattley, Helene A. Cattley, Isabel C. Hills, Bernard J. Wishaw, Lillian S. Wishaw, Mary I. Wishaw, Alice A. Wishaw and Winifred K. Wishaw, shareholders in the First Russian Insurance Company who are British citizens resident in London. The contentions of the respondent Superintendent of Insurance of New York are adopted by these shareholders and will not be restated here.

Opinions Below.

The opinion of the New York Supreme Court granting summary judgment dismissing petitioner's com-

plaint; will be found at R. 52 and is unreported. The unanimous memorandum decision of affirmance by the Appellate Division is reported in 259 App. Div. 871. The *per curiam* opinion of affirmance by the New York Court of Appeals is reported in 284 N. Y. 555. No rehearing or certificate was asked for in the highest state court.

Statement Against Jurisdiction.

The precise questions now raised by petitioner were decided adversely to it by this Court at the October Term, 1939, in *Moscow Fire Ins. Co. v. Bank of New York and Trust Co.*, 161 Misc. 905, aff'd 253 App. Div. 644, aff'd 280 N. Y. 286, rehearing denied 280 N. Y. 848, certiorari granted 308 U. S. 542, aff'd 309 U. S. 624, rehearing unanimously denied 309 U. S. 697. There are no questions raised, involved or decided below that were not finally set at rest by the decision in the *Moscow* case where the state courts found as a matter of fact that the identical confiscatory Soviet decrees under which petitioner claims as assignee did not extend to or embrace the New York assets of nationalized Russian insurance companies. Since that decision rested upon an adequate non-federal ground and the highest state court has held that there is no difference here (284 N. Y. 555), no reason exists why certiorari should now be granted to review the identical questions which this Court has heretofore decided adversely to petitioner.

The question is not, as petitioner claims, the failure of the state courts to recognize the Litvinoff assign-

¹ By the full Court. See Journal of March 25, 1940, No. 355, October Term, 1939.

ment of 1933, but instead the question of what, if anything, passed to petitioner thereunder. The *Moscow* case conclusively determined that nothing passed—as respects the New York assets of such insurance companies which were in fact wholly beyond the scope and effect of the Soviet nationalization decrees and which have been in the lawful custody of state authorities since 1925 pursuant to a state statute, the constitutionality of which is not challenged.

Statement.

Petitioner's statement (pp. 4-8) omits any mention of the context of the Soviet decrees under which it claims title as assignee, although admitting (pp. 2-3) that they are the identical decrees heretofore construed in the *Moscow* case. There the state court found as findings of fact (*Moscow Fire Ins. Co. v. Bank of New York and Trust Co.*, 309 U. S. 624 at R. 114-115):

“42. By a series of decrees issued by the Soviet Government in the end of 1921 and thereafter reenacted in substance by the Soviet Civil Code passed in October, 1922, but taking effect as of January 1, 1923, the effect of the nationalization decrees passed prior to 1921, including the decree providing for the nationalization of insurance enterprises was modified so as to apply only to such private property as was factually in the possession of the Soviet Government or organized toilers prior to May 22, 1922. * * *

45. Pursuant to said Soviet legislation of 1921 and 1922 limiting the effect of prior nationalization decrees, private property not factually in the

possession of or in the inventories of the Soviet government, its agents or representatives, was pursuant to the decision of the highest Soviet courts actually returned to its former owners.

46. The Soviet Government never claimed exterritorial effect of any of its ^{nation} ~~naturalization~~ decrees, except those relating to the Russian Merchant Marine.

47. It is the law of Soviet Russia that the ownership of property is to be determined by the law of the place where the property is located.

48. The decree of November 28, 1918² did not purport or intend to vest the Soviet State with title to any assets outside of Russia of nationalized Russian Insurance Companies.

49. The intervenor has failed to prove that it was the purport and intent of the Soviet decree of November 28, 1918 to vest the Soviet State with title to property outside of Russia of nationalized Russian insurance companies.

50. The oral opinion expressed by the intervenor's witness on Soviet law to the effect that, as a matter of Soviet law, the decree of November 28, 1918 (Intervenor's Exhibit 7) transferred to the Soviet state the property outside of Russia of nationalized Russian insurance companies is without support in the evidence and is contrary to the documentary evidence herein."

The New York Appellate Division, in affirming these findings held, *per curiam*, (*Moscow Fire Ins. Co. v. Bank of New York and Tr. Co.*, 253 App. Div. 644):

"The evidence adduced before the Referee sustains his finding 'That the Soviet decrees of con-

² Petitioner conceded that this was the sole basis for its claim of title (309 U. S. 624 at R. 1939-1941).

fiscation against the assets of Russian insurance companies were not intended to apply to such assets as were situated outside of Russia and in the United States but were intended to apply only to such assets as were situated in Russia."

The New York Court of Appeals, in turn affirmed and held (*id.* 280 N.Y. 286, 303, 314):

"Recognition of the Russian government has given to its decrees retroactively the force and effect of foreign law. . . . The question of the effect to be given to the foreign law within this State must be determined in accordance with the law of this State. Recognized principles of comity and international law or the control of international relations intrusted under the Constitution to the Federal Government are factors which at times dictate the content of the law of the State in such matters but foreign law is of effect here only insofar as the local law gives it effect. . . . The courts below have made the proper choice not because enforcement of confiscatory decrees situated elsewhere is contrary to our public policy but because under the law of this State such confiscatory decrees do not affect the property claimed here."

This Court affirmed this decision (309 U. S. 624). Rehearing was sought on the ground the affirmance was by a divided court³ and it was unanimously⁴ denied (309 U. S. 697, *Cf. Kobilkin v. Pillsbury*, 309 U.

³ In *United States v. Stone*, 308 U. S. 519, and *Helvering v. Johnson*, 308 U. S. 523, similar petitions were filed by the government and subsequently withdrawn.

⁴ *Cf. Hart v. United States* and *McQuillen v. Nat. Cash Register Co.*, Nos. 322 and 476 this Term where certain Justices did not sit on the rehearing applications.

S. 619, 695; *Brown v. Aspden*, 55 U. S. 25; *Shreveport v. Holm*, 125 U. S. 694.

The confiscatory decree of November 28, 1918 was promulgated during the period of so-called "Military Communism" in Russia when a policy of destroying private enterprise and ownership was pursued. This policy was definitely discontinued as early as 1922 and, pursuant to the decrees of the All-Russian Central Committee of October 27 and December 10, 1921, "a rule was established that the enterprises as to which factual nationalization had not been carried out up to May 17, 1921, belong to their former owners, that is they are not subject to nationalization." (309 U. S. 624 at R. 1961).

In construing these 1921 decrees the People's Commissar of Justice and President of the Supreme Court of the R. S. F. S. R. held that all enterprises which had not in fact passed prior to May 17, 1921 into the ownership of the Soviet authorities "are recognized factually not nationalized and are deemed 'belonging to their former possessors' (that is former owners)" (*id.* at R. 1963). This interpretation was also applied by the Supreme Court of the R. S. F. S. R., the highest court in Russia (*id.* R. 1962)⁵.

The various nations which have since extended diplomatic recognition to Soviet Russia have declined consistently to recognize or give extraterritorial effect to the confiscatory decrees. In 1921, despite recognition, companies acts were passed in Esthonia, Latvia and Poland providing for the winding up locally of foreign corporations (*Zeitschrift fuer Ostrecht* (1927)

⁵ Cf. also the ruling of the Soviet Commissariat of Justice: "The general annulment of agreements of life insurance does not extend to the territories located without the borders of the Union of Soviet Socialist Republics and particularly to the United States of North America" (*id.* at R. 856; italics ours).

1539, 56; *id.* (1928) 116). The same thing was done in Great Britain in 1929 despite diplomatic recognition there in 1924 (*In re Tea Trading Co.*, L. R. (1933) Ch. 647; *In re Russian Bank for Foreign Trade*, *id.* 745; *In re Russo-Asiatic Bank*, L. R. (1934) Ch. 720; *Russian & English Bank v. Baring Bros. Ltd.*, L. R. (1936) A. C. 405). France, despite recognition in 1924, proceeded to liquidate the French branches of Russian nationalized corporations under Article 2 of the French Bankruptcy Act (*Russo-Asiatic Bank*, 56 *Clunet* 78, 1095; *Banque Internationale de Commerce de Petrograd*, 62 *id.* 125; *Societe de Banque de Volga Kama*, 62 *id.* 125; *Banque d' Russe pour le Commerce étranger*, 62 *id.* 128; *Banque d' Azoff-Don*, 62 *id.* 134; *Northern Russian Ins. Co. v. Union & Phoenix Ins. Co.*, 42 *McNair* 66). Germany has adopted a similar position (*Ginsberg v. Deutsche Bank*, 1 *Ostrecht* (1925) 163, 164), as have Switzerland (*Comptoire d' Escompte v. Sosnowice*, 1921 *Semaine Judiciaire* 82; *Wilbuschewitch v. Zurich*, 53 *Clunet* 1110, 1113), Denmark (*Council of the Russian Orthodox Community in Copenhagen v. The Legation of the R. S. F. S. R. in Copenhagen*, *Ann. Dig. of Int. L. Cases* (1925-6) 24), Norway (*Russian Bank for Trade etc. v. Aktiebolaget Goeteborg's Bank* 25 *Darres* (1930) 695; *Re Second Russian Ins. Co.*, *id.* 697) and Greece (*Tribunal of Athens*, 52 *Clunet* 1111; *Court of Corfu*, 58 *id.* 752).⁶

Summary of Argument.

1. There is no conflict with *United States v. Belmont*, 301 U. S. 324, but even if such conflict existed it

⁶ For similar reliance on foreign law, see *Muller v. Oregon*, 208 U. S. 412, 419; *O'Malley v. Woodrough*, 307 U. S. 277, n. 6, 8; 9.

was resolved by the subsequent decision in *Moscow Fire Ins. Co. v. Bank of New York and Tr. Co.*, 280 N. Y. 286; aff'd 309 U. S. 624, rehearing denied unanimously in 309 U. S. 697.

2. The decisions below was plainly and expressly based upon an independent and adequate non-federal ground—viz. the non-applicability of the foreign confiscatory decrees as a matter of fact and of state law to the assets of the First Russian Insurance Company physically situate in New York and which have been in the lawful custody of the respondent Superintendent of Insurance since 1925 pursuant to a valid liquidation in accordance with applicable local law.

3. Since the questions here presented were finally determined adversely to the petitioner and upon the merits after a plenary trial and six years of exhaustive litigation in the *Moscow* case, no good or sufficient reason now exists for review by this Court in the exercise of its discretion of the identical questions then raised on motion for summary judgment. The "confusion" claimed exists, if at all, only because of petitioner's unwillingness to acquiesce in similar instances in the final decision of this Court in the *Moscow* case which, as noted, did not depend upon the validity or invalidity of the Litvinoff assignment.

I.

The decision of the highest state court does not conflict with *United States v. Belmont*, 301 U. S. 324.

The New York Court of Appeals said in the *Moscow* case (280 N. Y. 286, 308-9):

7 Bettman v. Northern Ins. Co., 134 O. S. 341; 344 relied on by petitioner has no application here. Cf. the opinion of the Ohio Court of Appeals, 27 O. L. A. 112 at p. 122, which was affirmed by the Ohio Supreme Court.

"In *United States v. Belmont* (*supra*) the Court was considering the sufficiency of pleadings which conclusively established that the United States was asserting, under assignment from the Soviet government, a claim to *intangible* property here of a Russian corporation which under Soviet decree had been confiscated by the government. (See opinion of Circuit Court of Appeals, 85 Fed. Rep: (2d) 542). The allegations in the complaint that under the decree the property of the corporation was confiscated by the Russian government and then transferred to the American government were admitted by demurrer, and as the Court pointed out, were not open to challenge. Such cases in no wise support the appellants' contention here, where we are considering whether title to property in the custody of this State has been transferred *in invitum* from its owner to the Soviet government or is 'dependent' upon the law of Russia."

And in its *per curiam* decision herein, the highest state court said, speaking of the *Moscow* decision (284 N. Y. 555, 556-7):

"... The decision left open no question which has been argued upon this appeal. We are agreed that without again considering such questions this court should in determining title to assets of First Russian Insurance Company, deposited in this state, apply in this case the same rule of law which the court applied in the earlier case in determining title to the assets of the Moscow Fire Insurance Company deposited here."

The present judgment was entered on respondent's motion, made on affidavit, for summary judgment

dismissing the complaint under Rule 113 of the New York Rules of Civil Procedure and Section 476 of the New York Civil Practice Act. Respondent's moving affidavit established this case was identical with the claims disposed of by the *Moscow* decision (R. 14-17). Petitioner did not deny this but opposed solely on the ground the motion was premature since the *Moscow* case was then still pending (R. 50-51)—a contention now conclusively set at rest by the subsequent final affirmance in that case.

Under the governing state law which controls, where as here the allegations of the moving affidavit on a motion for summary judgment are uncontested, even the complaint cannot be adverted to as proof in opposition to the motion (*Gnozzo v. Marine Tr. Co. of Buffalo*, 258 App. Div. 298, aff'd 284 N. Y. mem. 49). This rule is binding here (*Erie R. Co. v. Tompkins*, 304 U. S. 64; *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202; *Fidelity Union Tr. Co. v. Field*, 311 U. S. —). By this standard, petitioner's record here is fatally defective. The summary judgment motion was in effect unopposed and there is nothing that this Court can review since no federal question was raised on the record below.

Petitioner's suggestion (pp. 10-11) that the case was not properly one for summary judgment under the New York state practice is of course wholly unavailing here, as a ground for certiorari. The highest state court decided otherwise, if (as is doubtful) this question was raised at all below, when it unanimously affirmed the final judgment of dismissal which had been appealed from (284 N. Y. 555).

II.

The decision of the highest state court was expressly based upon an adequate and independent non-federal ground.

This much appears from the *per curiam* opinion itself (284 N. Y. 555) which incorporates by reference the prior opinion in the *Moscow* case (280 N. Y. 286, 848) wherein, as noted, the *Belmont* case was expressly distinguished, and the decision squarely based upon the state law applicable to findings made that the foreign decrees relied upon (which were provable facts) did not embrace the tangible assets of nationalized Russian insurance companies which had been deposited in New York in accordance with the valid requirements of a state law (nowhere challenged) and which are in the lawful custody of New York state authorities. This is an adequate non-federal ground on which the judgment below is grounded so that in such instance either dismissal of the certiorari petition (*McGoldrick v. Gulf Oil Corp.*, 309 U. S. 2; *Utilities Ins. Co. v. Potter*, No. 625 this Term; *Tax Commission v. Wilbur*, 304 U. S. 544; *Lynch v. New York*, 293 U. S. 52, 54, 55; *Knights of Pythias v. Meyer*, 265 U. S. 30, 32, 33) or its denial (*Public Service Comm'n v. Wisconsin Tel. Co.*, 309 U. S. 657; *New York City v. Central Savings Bank*, 306 U. S. 661) is required.

In fact it has long been held in an unbroken line of state decisions that the domestic branch of a foreign insurance company transacting business in New York, for many purposes "must be treated as a domestic company and as domiciled in this state" (*Morgan v. Mut. Benefit Life Ins. Co.*, 189 N. Y. 447, 454; *Comey*

v. United Surety Co., 217 N. Y. 268, 273, 274; *Matter of People (City Eq. Fire Ins. Co.)*, 238 N. Y. 147; *James v. Russia Ins. Co.*, 247 N. Y. 262, 265). No new or novel federal question is presented by this state court determination here nor will such question be found raised anywhere in the record below. Petitioner's suggestion (p. 3) that federal questions were raised in briefs and oral arguments in the state courts is of course unavailing here (*Lynch v. New York*, 293 U. S. 52, 54; *Zadig v. Baldwin*, 166 U. S. 485, 488).

The questions moreover were resolved wholly upon a construction of documentary evidence which this Court will not assume jurisdiction to construe (*Grayson v. Harris*, 267 U. S. 352; *St. Louis, Iron Mountain & So. R. Co. v. Craft*, 237 U. S. 648; *Willoughby v. Chicago*, 235 U. S. 45), particularly where the entire controversy has long since become moot by virtue of a prior decision on the same evidence and involving the identical basic facts and circumstances.

III.

No reason is advanced why the Moscow decision should now be overturned.

Nothing has intervened since the unanimous denial of rehearing in the *Moscow* case (309 U. S. 697) on March 25, 1940 or appears in the record herein that requires a review or reversal of that decision⁸. On the contrary, in the year that has intervened the menace of totalitarian and communistic doctrine is

⁸ Cf. the petition for rehearing filed in the *Moscow* case where the various collateral grounds now urged to support *certiorari* were fully set forth (No. 355 October Term, 1939).

becoming increasingly apparent to the democracies who survive. The confiscatory Soviet decrees were expressly found in that case to be "public penal enactments" (309 U. S. 624 at R. 109, 110). Comity in our international relations does not extend to or require the enforcement of such penal decrees of another state (*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 290; *Oklahoma v. Gulf &c. Ry. Co.*, 220 U. S. 290, 300; *Huntington v. Attrill*, 146 U. S. 657, 668; *Baglin v. Cusenier Co.*, 221 U. S. 580, 594, 596; *Ingenohl v. Olsen & Co. Inc.*, 273 U. S. 541, 544. This is also the New York rule (*Vladikavkazsky Ry. Co. v. New York Tr. Co.*, 263 N. Y. 369, 378-9; *Burth v. Backus*, 140 N. Y. 230, 239; *Frenkel & Co., Inc. v. L'Urhaire Fire Ins. Co.*, 251 N. Y. 243, 249).

The fact that petitioner now contends otherwise can not alter this rule since at most it is here but an assignee of the Soviets (*Guaranty Tr. Co. v. United States*, 304 U. S. 126, 134; *United States v. Buford*, 28 U. S. 12, 30) and this Court long ago declared that it would not sanction communistic doctrines of confiscation.

"The whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled" (*United States v. Percheman*, 32 U. S. 51, 86, 87). We are confident that it can not happen here. These friendly alien shareholders—our British allies—are equally entitled with our citizens to the protection of the due process clause (*Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489; *Hines v. Davidowitz*, 311 U. S. —n. 14). Nothing would be more abhorrent to our form of government than the suggested taking of one man's property and the giving it to another, no matter under what plausible

pretext it may be attempted (*Thompson, et al v. Consolidated Gas Utilities Corp*, 300 U. S. 55, 79).

Conclusion.

For these reasons it is respectfully submitted that the petition for a writ of certiorari should be either dismissed or denied—or, granted and the judgment below affirmed forthwith upon the authority of *Moscow Fire Insurance Co. v. Bank of New York and Tr. Co.*, 309 U. S. 624, 697.

APRIL 19, 1941.

ALBERT G. AVERY,
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First Russian Insurance Company,
as amici curiae.

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DEC 3 1941

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No. 42

IN THE

Supreme Court of the United States

October Term, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the FIRST RUSSIAN INSURANCE COMPANY, Established in 1827; VICTOR YERMALOFF, and others

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW YORK, NEW YORK COUNTY

**BRIEF ON BEHALF OF THE SURVIVING DIRECTORS
OF FIRST RUSSIAN INSURANCE COMPANY,
ESTABLISHED IN 1827, AS AMICI CURIAE**

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IN THE
Supreme Court of the United States.

October Term, 1941

No. 42

UNITED STATES OF AMERICA, *Petitioner*

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the FIRST RUSSIAN INSURANCE COMPANY, Established in 1827; VICTOR YERMALOFF, and others

**BRIEF ON BEHALF OF THE SURVIVING DIRECTORS
OF FIRST RUSSIAN INSURANCE COMPANY,
ESTABLISHED IN 1827, AS *AMICI CURIAE***

Consent of Parties

This brief is respectfully submitted upon the written consent of the parties hereto, filed with the Clerk of this Court.

Interest of Surviving Directors

By decision of the New York Court of Appeals in *Matter of People—Russian Reinsurance Company—First Russian Insurance Company, Established in 1827* (255 N. Y. 415), it was held that:

“3. The surplus remaining after payment of all claims so allowed by the liquidator should be paid to the Russian corporations represented by a quorum of the board of directors, deducting a sum sufficient to cover the expenses of the liquidator as well as intervening liens”.

In the companion case of *Matter of People—Northern Insurance Company—Moscow Fire Insurance Company of Moscow, Russia* (255 N. Y. 433), it was further held that:

“1. In determining the disposition of surplus assets of branches in this State of Russian insurance companies, after liquidation by the Superintendent of Insurance, directors, less than a quorum may be treated as conservators of the properties of their companies”.

Under the above cited decisions, the surviving directors of the First Russian Insurance Company, Established in 1827, as supported by a large proportion of the shareholders of the Company (255 N. Y. 415, 426), have, as trustees or conservators for creditors and shareholders, a direct interest in the decision of this Court. In the event of an affirmance of the judgment below, the unpaid creditors of the Company whose claims have long since been determined in proceedings by the Superintendent of Insurance as liquidator, will be paid and the liquidation by the Superintendent of Insurance brought to a close. The ownership of any surplus then remaining might still be left for subsequent determination, however, as between the United States and other creditors and the shareholders, since, as shown below, the issue before the Court is limited to the interest of the Superintendent of Insurance as liquidator.

The Limited Issue Before This Court

The present proceedings have nothing whatsoever to do with any foreign claims except those on which attachments were levied prior to August 8, 1925 and those filed with the Superintendent of Insurance prior to June 16, 1931, and there are at present no surplus funds for other creditors or for shareholders (R. 29). Only in the event that there be a surplus after the Superintendent of Insurance has completed his liquidation will there be anything for creditor claims on which attachments were levied or claims otherwise asserted after June 16, 1931, or for shareholders. The present controversy, therefore, between the United States and the Superintendent of Insurance is concerned solely with the question whether the United States is entitled to funds in possession of the Superintendent of Insurance as liquidator as against the adverse creditor claimants whose claims have been finally determined by the courts of the State of New York in the liquidation proceedings conducted by the Superintendent of Insurance. The alleged "residual interest", referred to so frequently in petitioner's brief, is non-existent at the present time and may never exist. Should a residue come into existence at the conclusion of the liquidation by the Superintendent of Insurance, the Superintendent has no present power to dispose of it or to liquidate claims against it, and it will continue intact until the final determination of the disposition thereof either in the pending action instituted by the petitioner or otherwise.

The judgment of the State Supreme Court merely dismissed the complaint in favor of the Superintendent of Insurance (R. 1-2, 4, 7, 9), leaving the action still pending against the other defendants. An affirmance by this Court, therefore, need not determine anything more than that the Superintendent of Insurance may complete his duties as liquidator and pay the specific claims which the

State courts have long since determined to be valid in the liquidation proceedings. An affirmance would seem, therefore, to be clearly required not only by authority of the *Moscow* case (309 U. S. 624) and the *Guaranty Trust Company* case (304 U. S. 126) but even by authority of the *Belmont* case (301 U. S. 324), if deemed applicable, wherein the rights of adverse claimants were recognized and preserved.

Summary of Argument

This case, unlike the case of *United States v. Belmont*, relied on by petitioner, does not arise on demurrer but upon a motion for summary judgment, and petitioner, therefore, cannot rely upon assumption of the truth of the allegations of the complaint. The primary question involved on the motion for summary judgment was one of state law and practice under Rule 113 of the New York Rules of Civil Practice. The question was whether the motion papers raised any issue calling for a trial as against the defendant Superintendent of Insurance.

The petitioner, in its affidavit in opposition to the motion for summary judgment (R. 50-51), having raised no issues of fact for trial but having, on the contrary, merely contended that the decision in the *Moscow* case, upon the authority of which the motion was made, had not become final and that the motion was accordingly premature, and having failed to deny the moving allegations to the effect that the instant case involves the same facts and questions presented by the *Moscow* case, petitioner impliedly recognized and agreed that the issues of fact and of law herein are the same as those in the *Moscow* case and that the decision herein should be governed by the final decision of this Court in the *Moscow* case.

This Court having thereafter affirmed the judgment in the *Moscow* case dismissing the similar claim of the pe-

itioner therein (although by an equally divided court), and, having thereafter denied a rehearing in such *Moscow* case, it is not now open to petitioner to change its position herein and to seek a trial of the same issues of fact involved and decided in the *Moscow* case.

The instant appeal is in effect merely an attempt to obtain indirectly a reargument of the issues in the *Moscow* case which this Court has already denied.

In any event, the decision by this Court in the *Moscow* case was correct and should not be overruled.

The majority opinion in the *Belmont* case has no application here not only because that case was merely a decision on the pleadings, but also because the subsequent *Guaranty Trust Company* decision (304 U. S. 126) plainly shows that the minority opinion in the *Belmont* case now represents the view of this Court. Furthermore, both under the majority and the minority opinions in the *Belmont* case, the adverse creditor claims finally determined in the liquidation proceedings conducted by the Superintendent of Insurance as liquidator of the First Russian Insurance Company must be paid before there can be any residual interest of the First Russian Company or of its alleged statutory successor, or the assignee thereof. As conclusively held in the *Guaranty Trust Company* case, the acceptance of the Litvinoff assignment by the Executive did not imply any federal policy compelling the extra-territorial enforcement of Soviet decrees as against property in the custody of a State court or of State officials; and in the silence of the Federal Government, State laws and State policies have not been abrogated.

The United States branch of the First Russian Insurance Company was, under New York law, an organization separate and distinct from the home office of the Company, and its local capital was always subject to the laws of the State of New York. When the Superintendent of Insurance took over such branch for liquidation, he did so under New York law in the interests of the creditors and

policyholders and shareholders of the First Russian Company wherever located; and, prior to recognition of the Soviet Government by the United States, the state courts in the exercise of an undoubted jurisdiction determined, in the absence of a liquidation for the benefit of creditors and shareholders at the domicile, that foreign creditors having valid attachment liens which accrued prior to beginning of the local liquidation in 1925 or claims filed in the liquidation proceedings were entitled to have their claims determined in the local liquidation in accordance with the established law, including the law with particular reference to the First Russian liquidation as settled by the decision of this Court in *United States v. Bank of N. Y. & Tr. Co.*, 296 U. S. 463, 476.

The petitioner falls into error in contending that the facts as found in the *Moscow* case were not made a part of the instant record on the motion for summary judgment.

Even without the aid of the decision in the *Moscow* case, and even without the findings of fact made in that case, the judgment below should be affirmed because it goes no further than to permit the Superintendent of Insurance to conclude his liquidation by payment of the claims finally determined in the liquidation proceeding, leaving open and undetermined any question of the right of petitioner to assert or to maintain a claim to any residual interest which may be disclosed after the conclusion of the local liquidation.

This case does not involve any question of the construction or validity of the Litvinoff assignment but involves only the question of the title of the Soviet government under Soviet confiscation decrees to assets located and trusted in the State of New York. Such question does not arise under the Constitution or laws of the United States but under the laws of the Soviet Union or of the State of New York.

FIRST POINT

The motion for summary judgment did not admit the allegations of the complaint and consequently the case of *United States v. Belmont*, relied on by petitioner, has no application.

The procedure and principles relative to a motion for summary judgment as distinguished from a motion to dismiss for insufficiency are well established. They were introduced into the practice of New York in 1921. They have now also been adopted in Rule 56 of the Federal Rules of Civil Procedure.

The petitioner, in relying on the cases of *United States v. Belmont*, 301 U. S. 324, and *United States v. Manhattan Company*, 276 N. Y. 396, erroneously appears to view the motion herein made by the Superintendent of Insurance which resulted in the dismissal of the complaint herein in his favor, as merely a motion to dismiss for insufficiency. On the contrary, such motion was a motion for summary judgment under Rule 113 of the New York Rules of Civil Practice and Section 476 of the New York Civil Practice Act. The decision on the motion was a dismissal of the complaint on the merits in favor of the Superintendent of Insurance.

The motion was made on an affidavit showing that the instant claim of petitioner is in all respects identical with the claim of petitioner as dismissed in the *Moscow* case (280 N. Y. 286; 309 U. S. 624; 309 U. S. 697). The opposing affidavit on behalf of petitioner did not deny a single allegation of the moving affidavit but relied entirely on the argument that the motion was premature in view of the then proposed application to this Court in the *Moscow* case for a writ of certiorari.

The moving affidavit on behalf of the Superintendent of Insurance having alleged that the facts in the instant case,

including those relating to the Soviet law, are parallel with those which had been established in the *Moscow* case (R. 15), it was incumbent upon petitioner if it desired to claim that there were other facts and issues in the instant case which required a trial, to set forth such facts and issues in its opposing affidavit in order that the Court might determine whether there was an issue of substance to be tried. (Rule 113; *Richard v. Credit Suisse*, 242 N. Y. 346, 349; *Curry v. Mackenzie*, 239 N. Y. 267, 270; *General Investment Co. v. Interborough R. T. Co.*, 235 N. Y. 133, 142-143; *Dwan v. Massarene*, 199 App. Div. 872).

In opposing the motion of the Superintendent of Insurance, the petitioner was not entitled to rely upon an assumption of the truth of the allegations of the complaint but was required to set forth specifically by affidavit any facts upon which it relied to show issues requiring a trial (*Gnozzo v. Marine Trust Co. of Buffalo*, 258 App. Div. 298, 299; aff'd 284 N. Y. 617; *Lederer v. Wise Shoe Co.*, 276 N. Y. 459, 462-463; *O'Meara v. National Park Bank*, 239 N. Y. 386, 395; *White v. Merchants Despatch Transportation Co.*, 256 App. Div. 1044).

The petitioner, in its opposing affidavit, having denied none of the allegations of the moving affidavit, and having alleged no facts except that it intended to apply for certiorari in the *Moscow* case, the Court correctly assumed that the allegations of the moving affidavit were true and that there were no issues to be tried (*Lederer v. Wise Shoe Co.*, *supra*, at p. 464; *General Investment Co. v. Interborough R. T. Co.*, *supra*, at p. 143; *Title Guarantee & Trust Co. v. Smith*, 215 App. Div. 448, 453; *Lee v. Graubard*, 205 App. Div. 344; *Pross v. Foundation Properties, Inc.*, 158 Misc. 304, 308; *Geraci v. Fabbozi*, 161 Misc. 450; *Mosca v. Parker-Aeolus Inc.*, 130 Misc. 186, 187; *Maltz v. Daly*, 120 Misc. 466, 467).

The fifth paragraph of Rule 113, applicable to a defendant, provides that:

"Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record."

Under the provisions of the above quoted fifth paragraph of Rule 113, the defendant Superintendent of Insurance was entitled to move for summary judgment on the documentary evidence or official record in the *Moscow* case irrespective of the question whether the instant case is one of those enumerated in the eight numbered sections of the first paragraph of Rule 113 (*Lederer v. Wise Shoe Co.*, 276 N. Y. 459; *White v. Merchants Despatch Transportation Co.*, 256 App. Div. 1044; *Levine v. Behn*, 257 App. Div. 156, reversed on other grounds, 282 N. Y. 120; *Pross v. Foundation Properties, Inc.*, 158 Misc. 304).

That the official record in the *Moscow* case, referred to in the moving affidavit, was not physically attached to the moving affidavit is immaterial. The record in that case, together with the remittitur from the Court of Appeals, was on file in the office of the Clerk of the Supreme Court and both the Court and the parties were familiar with it. The Court took judicial notice of it (*Matter of Clarke*, 145 Misc. 660, 665; *Matter of Greenberg*, 158 Misc. 446, 448; *Matter of Ordway*, 196 N. Y. 95, 97). "There is nothing in Rule 113 which specifies or limits the form or character of the documentary evidence or official record upon which the motion for summary judgment by a defendant is to be based" (SHIENTAG, J., in *Levine v. Behn*, 169 Misc. 601, 605); "All that is required is that the defendant, where his defense is founded upon documentary or official record, shall show facts establishing a defense *prima facie*. If he

submits merely part of the record, it is within the province of the plaintiff to submit the remainder, if in his judgment he can thereby show facts sufficient to raise an issue as to the official record" (*Per Curiam in Wells v. Rubin*, 254 App. Div. 484, 485).

If plaintiff had desired that the *Moscow* record be physically attached to the moving papers, he should have raised the question at the time of the submission of the motion (*White v. Merchants Despatch Transportation Co.*, 256 App. Div. 1044).

Moreover, the proffert of the *Moscow* record in the moving affidavit made such record a part of the moving affidavit, and the Court and the several parties were bound to consider it. As said in *Straus v. American Publishers Assn.*, 201 Fed. Rep. 306, 309 (appeal dismissed 235 U. S. 716), in deciding a motion for judgment on the pleadings:

"The first contention of the plaintiffs in error is that the record of the cause in the state court should not have been inspected by the Circuit Judge, because it was not annexed as an exhibit to the answer. This is a very technical objection, especially in view of the fact that the action was referred to by the plaintiffs themselves in their complaint. It would prove a cumbersome practice to load such records upon pleadings. By the proffert the record became a part of the pleading and the court was bound to inspect it as such. That is the practice in this circuit (*Bogart v. Hinds* (C. C.) 25 Fed. 484); and there is abundant authority elsewhere (*American Bell Tel. Co. v. Southern Tel. Co.* (C. C.) 34 Fed. 803; *Dickerson v. Greene* (C. C.) 53 Fed. 247; *Germain v. Wilgus*, 67 Fed. 597, 14 C. C. A. 501; *Heaton v. Schlochtmeier* (C. C.) 69 Fed. 592)".

The final judgment of the State Court in the instant case must, of course, be taken as determining that the procedure actually adopted satisfied all state requirements (*United Gas Co. v. Texas*, 303 U. S. 123, 139). This Court has no revisory power over state practice except where

such practice is used to evade constitutional guarantees (*Drivers Union v. Meadowmoor Co.*, 312 U. S. 287, 296).

The primary question here is merely one of state practice—that is to say, whether the petitioner in its opposing affidavit on the motion for summary judgment set forth any or sufficient facts to indicate that there was any issue requiring a trial of the petitioner's claim as against the Superintendent of Insurance. Obviously, no such facts were set forth and the Court was therefore bound under settled New York law to grant the motion for summary judgment.

SECOND POINT

The instant case should be now finally determined by this Court without remand for trial,

The petitioner's sole ground of opposition to the motion for summary judgment was that this Court had not then rendered its decision in the *Moscow* case. There was not then, nor is there now, any claim by petitioner that the facts and the questions in the instant case are any different from those in the *Moscow* case, or that the evidence on any trial in the instant case would be any different from that in the *Moscow* case. As shown by the decisions cited under the First Point hereof, the petitioner's failure to deny the moving allegations to the effect that the facts in the *Moscow* case and the instant case are parallel and that the Soviet decrees involved are also the same constituted admissions by the petitioner of the truth of such allegations. Thus, the assumptions of fact and the theories of law upon which the motion for summary judgment was submitted by both parties and entertained by the court were that the instant case involved precisely the same facts and questions as were involved in the *Moscow* case, and that the final decision in the *Moscow*

case would govern the decision in the instant case. The petitioner may not, even if it desired to do so, take an inconsistent position in this Court. (*Brown v. Gurney*, 204 U. S. 184, 190; *United States Shipping Board Emergency Fleet Corporation v. South Atlantic Dry Dock Co.*, 19 Fed. (2nd) 486, 489; *Southern Cotton Oil Co. v. Shelton*, 220 Fed. Rep. 247, 256).

This Court should now, therefore, decide the instant case either as a case involving in all material respects the same facts and the same questions presented by the *Moscow* case (*Stone v. Farmers Bank of Kentucky*, 174 U. S. 409, 412) or as a case involving only the adjudged creditor claims determined in the liquidation proceedings and protected even by the decision in the *Belmont* case. To any extent deemed necessary, this Court may take notice of its records in the *Moscow* case as heretofore heard and determined by this Court (*Freshman v. Atkins*, 269 U. S. 121, 124; *Dimmick v. Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 217).

"One trial of an issue is enough" (*Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 78; *Baldwin v. Traveling Men's Association*, 283 U. S. 522, 525).

THIRD POINT

The decision in the *Moscow* case was correct, and the judgment in the instant case should be affirmed on reason and on the authority of the prior *Moscow* decision.

In the *Moscow* case, the undersigned, as counsel for Paul Lucke, sole surviving director of the *Moscow* Company and conservator of its property, and as such a party in the cause, submitted to this Court a brief which argued at some length the questions involved in that case. As

from the viewpoint most favorable to petitioner, precisely the same questions are involved in the instant case, the Court is respectfully referred to that brief as containing the reasons and authorities upon which the undersigned rely in respectfully urging that the judgment in the instant case should be affirmed. Without repeating here the arguments advanced by the undersigned in the *Moscow* case, it may not be out of place to note briefly hereunder the answers to some of petitioner's arguments in its brief in this case.

Answering Petitioner's Point I

In particular, the argument of the petitioner herein upon the *Belmont* case is fallacious. The petitioner contends that the *Belmont* case is conclusive. This Court did not think so in the *Moscow* case. Moreover, even the *Belmont* case indicated that adverse creditor claims, such as those involved here, would be entitled to protection. The petitioner further contends that the *Guaranty Trust Company* case (304 U. S. 126) has no application here. In that case, the petitioner here, contrary to its assertions on page 34 of its brief, argued broadly that the United States as assignee of the Soviet Government was not bound by the New York Statute of Limitations since such statute "conflicts with and impedes the execution of the Executive Agreement between the Soviet Government and the United States by which the assignment was effected" (304 U. S., at p. 131). This Court held that, assuming that the respective rights of the United States and the Soviet Government could have been altered by force of an executive agreement, there is nothing in the agreement and assignment of November 16, 1933, which purports to enlarge the assigned rights in the hands of the United States (304 U. S., at p. 142). Continuing, this Court, at page 143 in the *Guaranty Trust Company* case, held further as follows:

"There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."

It is significant to note that the above quotation is in almost the exact words of the concurring opinion in the *Belmont* case.

Under the clear language of the opinion in the *Guaranty Trust Company* case and the concurring opinion in the *Belmont* case, there is no support whatsoever for petitioner's argument on page 26 and the following pages of its brief, to the effect that the Executive Agreement of November 16, 1933, established a national policy prohibiting any court from denying extra-territorial effect to the Soviet decrees of confiscation. The question of extra-territorial effect of the Soviet decrees upon property in this country thus remained a judicial question unaffected by the Executive Agreement (*U. S. v. Bank of New York & Trust Co.*, 10 Fed. Supp. 269, 272). As said in *Banco De Espana v. Federal Reserve Bank*, 114 Fed. 2nd 438, 442:

"The Courts will leave for the Executive the determination of all 'political' issues; in the international field this means such matters as the recognition of new governments or the making of treaties, *not the direct determination of questions of property.*" (Italics supplied.)

Aside from the conclusive effect of the decision of this Court in the *Guaranty Trust Company* case on this point, it should be noted that, in the interchange of letters by the

President of the United States and Commissar Litvinoff of the Soviet Government, mention was made not only of claims and counterclaims of the two governments involved, but also of the nationals of each country. There could not have been, therefore, an intention in the correspondence to eliminate at the outset all possible claims of Russian nationals under the agreement and assignment.

Even without the support of an alleged-but non-existent national policy, operating to compel the enforcement of the Soviet decrees of confiscation as against property which has always been located in this country, petitioner contends that even in the silence of the Federal Government the States have no power to deny effect extra-territorially to the Soviet decrees, because, as alleged, a denial of such effect would be a hostile act. It has never before been held or suggested that in the absence of an applicable federal constitutional, statutory or treaty provision the decision of a State court rendered according to its own law upon questions of title to real or personal property within its custody or control constitutes a hostile act against anyone. Nor has it ever before been held or suggested that a decree of a foreign government has any extra-territorial force as a matter of right. It would seem too clear for argument that without the aid of some established federal law or policy state laws and rights arising under them are not to be overridden, and such was the holding in the *Guaranty Trust Company* case and in the concurring opinion in the *Belmont* case, *supra*. The case of *Hines v. Davidowitz*, 312 U. S. 52, so much relied upon by petitioner, was not a case of silence of the Federal Government, but one where there were both a state and a federal statute covering the same subject-matter which were held to be in conflict. The only contention in such case which was passed upon by this Court was the final contention of appellees that the federal statute involved precluded state action (312 U. S., at pp. 61-62). In fact, it was not denied that the state statute was valid until the enactment of the federal law (312 U. S., at p. 75).

Since, as held in the *Guaranty Trust Company* case, the United States has no greater rights here than the Soviet Government would have had in the absence of the assignment by it to the United States, the silence of the Federal Government as to any declared policy with respect to extra-territorial force of the Soviet decrees can have only the result that the state law and policy remained just as effective as opposed to the claims of the assignee petitioner as they would have been as opposed to the unassigned claims of the Soviet Government itself.

The situation here is not at all like the situation arising from the decrees of the governments in exile of the countries of Europe occupied by Germany, referred to in petitioner's brief. The decrees of the governments in exile are not confiscation decrees. They are conservation and protection decrees, designed to safeguard and not to destroy the rights of the owners, and to prevent any property involved from falling into the hands of the Germans.

Answering Petitioner's Point II

In spite of petitioner's argument to the contrary, it has always been the law of the State of New York that a domestic branch established under New York law of an alien insurance company is a complete organization, separate from its home office, having its own capital and a legal domicile within the State of New York (*Moscow* case, 280 N. Y. 286, 309; *James & Co. v. Russia Ins. Co.*, 247 N. Y. 262, 265; *Matter of People—Norske Lloyd Ins. Co.*, 242 N. Y. 148, 159-161; *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 255; *Comey v. United Surety Co.*, 217 N. Y. 268, 274; *Morgan v. Mutual Benefit Life Ins. Co.*, 189 N. Y. 447, 453-454; *Martine v. International Life Insurance Society*, 53 N. Y. 339, 346-348; *Standard Marine Ins. Co. v. Alex. Verity*, 243 App. Div. 639, 640). As said by the Superintendent of Insurance in his annual report to the Legislature for the year 1915: "Under our statutes,

therefore, the United States Branches transact business as quasi entities rather than as members of their parent corporations" (*N. Y. Ins. Report*, Part I, Fire and Marine, 1915, p. 10). It was because of this situation that the United States branch of the First Russian Company was able to transact business and was permitted by the Superintendent of Insurance to do so long after the home office in Petrograd had been terminated and liquidated and its Russian assets confiscated.

As required by the New York Insurance laws, the capital of the United States branch of the First Russian Company was segregated from the capital of the home office of the Company and invested in securities specified by the New York Insurance Law, legal title to which was vested in local insurance officials and in local trustees under written indentures of trust. Such local capital came under the protection of and was subject to the laws of the State of New York, and the courts of that jurisdiction had the right to determine the question of conflicting rights in and to such local capital (*Hutchison v. Ross*, 262 N. Y. 381, 388-389).

When the Superintendent of Insurance in 1925, long prior to recognition of the Soviet Government by the United States, by order of the State Supreme Court took over the United States branch of the First Russian Company for liquidation, the Superintendent took possession of the assets not merely for the benefit of creditors in New York but for the benefit of all the creditors and policyholders and shareholders of the Company wherever located. As said by the New York Court of Appeals in *Matter of People, City Equitable Fire Insurance Co.*, 238 N. Y. 147, 156:

"The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this state or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose".

In 1931, still prior to recognition, the New York Court of Appeals held that the surplus assets of the First Russian Company must be made available for payment of creditors and policyholders with claims founded upon foreign business (*Matter of People—Russian Reinsurance Company and First Russian Insurance Company*, 255 N. Y. 415, 422), and that any surplus remaining after payment of all valid claims filed with the Superintendent of Insurance or founded upon attachments must be paid to a quorum of the directors of the Company (p. 424). Such decision was a judgment of legal finality and was so intended to be. All that was left was the administrative detail. Recognition of the Soviet Government came thereafter and was not retroactive in effect as to acts sought to be given effect extra-territorially (*Guaranty Trust Co. v. United States*, 304 U. S. 126, 140; *Lehigh Valley R. Co. v. State of Russia*, 21 Fed. 2nd 396, 401; certiorari denied, 275 U. S. 571; *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N. Y. 369, 379). Recognition and the assignment executed at the time thereof had no effect as law in this country except as from November 16, 1933; and rights to property having a situs in this country which had accrued prior to such date were not invalidated by recognition and the assignment made at the time thereof (*United States v. Arrédondo*, 6 Pet. 691, 748; *Harer v. Yaker*, 9 Wall. 32, 34; *Dooley v. United States*, 182 U. S. 222, 239; *Neilsen v. Johnson*, 279 U. S. 47, 52; *Todok v. Union State Bank*, 281 U. S. 449, 454). Whatever the effect of recognition and whatever the meaning of the assignment, decisions of our courts rendered with legal finality prior to recognition and the assignment are *res judicata* and valid against the world (*Guaranty Trust Company v. United States*, 304 U. S. 126, 141; dissenting opinion in *U. S. v. Bank of New York and Tr. Co.*, 77 Fed. 2nd 866, 877-878, the dissenting opinion being on other grounds).

While it is true that the courts of New York have always remitted surplus assets of an alien insurance company to a domiciliary liquidator where one existed for the benefit of creditors and shareholders, it is clear that the liquidation of a corporation implies winding up and distribution of the assets among the creditors and stockholders (*United States v. Bank of New York and Trust Co.*; 10 Fed. Supp. 269, 271; *Lafayette Trust Co. v. Beggs*, 213 N. Y. 280, 283-284; *Matter of Silkman*, 121 App. Div. 202). No case is cited and none exists holding that local assets must be remitted to a foreign jurisdiction to permit the foreign sovereign to confiscate them.

A confiscating foreign government is not a liquidator within the meaning of the term under the conflicts of law rule, and its decrees of confiscation are not effective as such in other jurisdictions (*Huntington v. Attrill*, 146 U. S. 657, 669; *Hilton v. Guyot*, 159 U. S. 113, 163; *Second Russian Ins. Co. v. Miller*, 268 U. S. 552, 560; *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 257; *Frenkel & Co. v. L'Urbaine Fire Ins. Co.*, 251 N. Y. 243, 249).

Since there was no basis for the application of the ordinary rule of conflicts of law, the state courts undertook themselves to make distribution of the surplus assets in satisfaction of the claims of foreign creditors proceeding locally in the New York courts. This was in accordance with accepted law and practice.

As said in *Sands v. E. S. Greeley & Co.*, 88 Fed. 130, 133 (WALLACE, J.):

"It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver."

As said by this Court in *Clark v. Williard*, 294 U. S. 211, 214:

"The principle of these decisions applies with undiminished force to a statutory successor. In respect of his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession."

Finally, in the very matter of the First Russian Insurance Company, this Court in *United States v. Bank of New York and Trust Co.*, 296 U. S. 463, 476, speaking of the *in rem* liquidation proceedings, held that:

"When the statutory trust was satisfied by the payment of domestic creditors and policyholders, it did not follow that the remaining assets were automatically released and the state court was *ipso facto* shorn of its jurisdiction. The court still had control of the property and necessarily had the pertinent equitable jurisdiction to decide what should be done with it. In such a case, the court might direct that the surplus assets should be remitted to a domiciliary receiver—if there were one—on appropriate conditions. *Matter of People (Norske Lloyd Insurance Co.)*, 242 N. Y. 148; 151 N. E. 159. Or the court might direct further liquidation, in order to provide for the payment of other claims, if that course appealed to the sense of equity in the particular circumstances. *Matter of People (Russian Reinsurance Co.)*, *supra*, p. 423. The latter action was taken and the Superintendent of Insurance was continued in possession of the assets subject to the control of the court. He was virtually its receiver for the purposes specified."

Answering Petitioner's Point III

Under its Point III, petitioner again argues that the allegations of its complaint must be accepted as true. Under the first point of this brief of the undersigned, it is shown that this argument is fallacious under the state law relating to summary judgment.

Petitioner contends that the motion papers of the Superintendent of Insurance did not raise any issue of fact. This contention is erroneous. The moving affidavit specifically alleged:

"The plaintiff claims ownership of the funds by virtue of several decrees of the Russian Government which, it is claimed, dissolved, terminated and nationalized all Russian insurance companies and organizations. It is further alleged that these decrees transferred title to the assets of the United States Branch of the First Russian Insurance Company, Established in 1827, to the Russian State which in turn assigned the property to the United States of America on November 16, 1933 (Complaint, pp. 8-9).

"The bases, therefore, of the claim of the plaintiff are the Soviet decrees, which, it is asserted, have extra-territorial effect and had force to transfer title to property always in the State of New York to the Soviet Government (R. 13-14).

• • • • •

"So far as it is material here, therefore, the facts in the Moscow and the instant cases are parallel. The facts could not be different because both companies had to comply with the provisions of Section 27 of the Insurance Law, (*Cons. Laws*, ch. 78) as a condition precedent to doing business here.

"The Soviet decrees involved are also the same. In the Moscow case the United States relied on the decree of November 18, 1919 annulling all life insurance contracts, a decree dated March 4, 1919 on the liquidation of obligations of State enterprises, and a decree dated June 28, 1918 that certain enterprises located within the Soviet Union are the property of the Republic. In the instant case, the same decrees are relied upon (Complaint, par. 8)" (R. 15-16).

The prior allegation in the moving affidavit that "There is no dispute as to the facts." (R. 13) was directed to the facts as settled in the *Moscow* case, and to the facts concerning the history of the organization of the United States

branch of the First Russian Insurance Company and those concerning the proceedings and litigations involving the said Company since its admission to do business in the State of New York.

The petitioner asserts that the only questions considered by the New York Court of Appeals in this case were the questions of law deciding in the *Moscow* case. It is, of course, true that the Court of Appeals is limited to consideration of questions of law, but the issue whether a finding of fact is supported by evidence is a question of law. Moreover, the court of first instance and the Appellate Division were obliged to consider and decide the questions of fact involved.

It is respectfully submitted, as contended in the first point of this brief, that the record in the *Moscow* case was before the state courts throughout in the instant case, and that it is before this Court to the same extent as it was in the *Moscow* case.

FOURTH POINT

Even without the support of the *Moscow* case or the findings of fact made therein, the judgment below should be affirmed.

As hereinbefore shown, the motion for summary judgment was made only on behalf of the Superintendent of Insurance and the petitioner's complaint was dismissed only in favor of the Superintendent of Insurance. The issue on the instant record is, therefore, much narrower than in the *Moscow* case. Here, the Superintendent of Insurance is still conducting the *in rem* liquidation begun more than eight years prior to recognition of the Soviet Government by the United States. In the liquidation conducted by him pursuant to New York Law, the state courts have finally determined certain creditor claims,

which have not been paid solely by reason of stays procured by petitioner. These claims are *res judicata* which would be binding on the First Russian Company if it were still in existence and are binding on any liquidator or statutory successor thereof. There can be no "residual interest" for anybody, not even the petitioner, until the payment of these adjudicated claims and the interest and expenses—constantly increasing—caused by the litigation of the petitioner. It is respectfully submitted that the petitioner has no just claim to any part of the First Russian assets; but assuming that it has a just claim to the "residual interest" referred to in petitioner's brief, the judgment below should be promptly affirmed in petitioner's own interest to the end that further interest and expenses may be terminated and the possibility of an ultimate residue not entirely eliminated.

FIFTH POINT

The question of the alleged title of the Soviet Government to the property in the custody of the Superintendent of Insurance as liquidator of the domesticated United States branch of the First Russian Insurance Company is not one arising under the Constitution or laws of the United States.

The claim asserted herein by the petitioner is asserted solely as assignee of the Soviet Government. The transfer of such claim to the United States did not give it any greater validity than it possessed in the hands of the assignor (*United States v. Buford*, 3 Pet. 12, 30). The Litvinoff assignment, as held by this Court, without dissent in *Guaranty Trust Co. v. United States*, 304 U. S. 126, 143, did not purport to confer upon the United States any rights other than those which the Soviet Government

could have itself exercised after diplomatic recognition—that is, to collect the claims in conformity to local law—and did not purport to override state laws or to impair rights arising under them.

There is here no dispute as to the validity of the acceptance of the assignment, nor is there any dispute over the fact that the petitioner obtained by the assignment any rights which the Soviet Government had prior thereto in and to the funds in the custody of the Superintendent of Insurance. The ultimate question here is only whether the Soviet Government had any rights to convey, as against the particular funds here involved, to the prejudice of creditor claimants to the funds whose claims have been finally determined. If it had any such rights, they did not arise under the Constitution or laws of the United States, but had their genesis either in Soviet law or in the laws of the State of New York.

The only federal question lurking in the background of this case is to be found in the fact that the President of the United States, on its behalf, accepted the Litvinoff assignment under authority conferred upon him by the Constitution of the United States. What, if anything, the United States got by the assignment, however, so far as these funds are concerned, depends entirely upon the law either of the Soviet Government or the law of the State of New York which, in the person of its Superintendent of Insurance, holds the funds (*Gully v. First National Bank*, 299 U. S. 109).

As said by Mr. Justice CARDOZO in the above cited *Gully* case, at page 112:

“How and when a case arises ‘under the Constitution or laws of the United States’ has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action. *Starin v.*

New York, 115 U. S. 248, 257; *First National Bank v. Williams*, 252 U. S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another".

As further said by Mr. Justice Cardozo in the *Gully* case at page 116:

"By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co. v. Mottley*, *supra*. With no greater reason can it be said to arise thereunder because permitted thereby".

If a suit upon a state statute does not arise under federal law, certainly a suit upon Soviet confiscation decrees does not so arise.

By its decisions in the *Moscow* case, and in the instant case, the New York Court of Appeals decided only two primary questions:

1st—Whether the Russian nationalization decrees were intended to have an extraterritorial effect to cover funds of a U. S. branch of a Russian insurance company deposited under the laws of the State of New York; and

2nd—Whether, even if so intended, the courts of New York will give them their intended effect (*Moscow* case, 280 N. Y. 286, 302).

Neither of these questions arose under federal law or required any reference to federal law. The negative answer to the first of such questions involved merely a review of the evidence to ascertain whether it supported the findings. A state court construction of a law of another jurisdiction to the effect that it was not intended to have

extraterritorial effect does not raise a federal question (*Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 274-275). The negative answer to the second of such questions involved the construction of the laws of the State of New York which likewise raised no federal question (*Pacific Ins. Co. v. Commission*, 306 U. S. 493, 500; *Milwaukee County v. White Co.*, 296 U. S. 268, 272). In particular, the courts of the State of New York were competent to decide all questions not expressly excluded by federal law relating to the business and property of a domesticated U. S. branch of a Russian company established under the laws of the State of New York. As said by this Court in *Graham v. Boston, Etc. R. R. Co.*, 118 U. S. 161, 168: " . . . one State may make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction."

Conclusion

The property here involved was deposited and trusted in the State of New York subject to the protection as well as the liability of New York law (*Hutchison v. Ross*, 262 N. Y. 381, 388-391; *Wassman v. Banque de Bruxelles*, 254 N. Y. 488, 492-494; *U. S. v. Guaranty Trust Co.*, 293 U. S. 340, 345-346; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 671.)

Under constitutional guaranties, neither the Federal Government nor the State Government could confiscate it (*Russian Fleet v. United States*, 282 U. S. 481), or, it is submitted, agree to be the beneficiary of foreign confiscation decrees. Nor, under the Federal Constitution, could the State of New York either pass or enforce any law impairing the implied contract between the state and the owners of the property implicit in the deposit of the funds with the statutory trustees. As said by this Court in *Williams v. Bruffy*, 96 U. S. 176, 184:

"The Constitutional provision prohibiting a State from passing a law impairing the obligation of contracts, equally prohibits a State from *enforcing* as a law an enactment of that character, from whatever source originating." (Italics by the Court.)

The funds, while deposited and trustee'd primarily for the benefit of U. S. creditors and policyholders of the Company, were secondarily received for the benefit of "all its policyholders, creditors and stockholders wherever they may be" (*Matter of People (City Equitable Fire Ins. Co.)*, 238 N. Y. 147, 156; *Matter of People (Norske Lloyd Ins. Co.)*, 242 N. Y. 148, 165). In protecting creditors and shareholders, the New York courts were therefore merely carrying out the purposes of the statutory trusts created under New York law. That in protecting the claims of creditors and shareholders in preference to the claims of a confiscating foreign government never having custody or control of the funds, the courts of New York were acting in accordance with just and equitable principles, no one can dispute.

The petitioner has no just claim to any of the funds in question because the Soviet Government has none. If it has any arguable claim at all such claim is limited to what may remain after completion of the pending liquidation by the Superintendent of Insurance.

The judgment below should be affirmed.

Respectfully submitted,

PAUL C. WHIPP,

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*Counsel for Surviving Directors of First
Russian Insurance Company, Estab-
lished in 1827, Amici Curiae.*

November, 1941.

FILE COPY

No. 42

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA

Petitioner

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; VICTOR YERMALOFF, and others

On Writ of Certiorari to the Supreme Court of the State of New York, New York County

**BRIEF ON BEHALF OF VICTOR YERMALOFF
AND OTHERS, CREDITORS**

CARL S. STERN

Counsel for Victor Yermaloff
and others, Amicus Curiae

CARL S. STERN
FREDERIC C. PITCHER
Of Counsel

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No. 42

IN THE

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Petitioner

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; VICTOR YERMALOFF, and others

On Writ of Certiorari to the Supreme Court of the State of New York, New York County

BRIEF ON BEHALF OF VICTOR YERMALOFF AND OTHERS, CREDITORS

With the consent of the Solicitor General and the Attorney for the Superintendent of Insurance of the State of New York, this brief is filed on behalf of Victor Yermaloff, and others, defendants in this action, creditors of the First Russian Insurance Company,¹ whose claims have been

¹This group of creditors is described in the complaint as represented by Messrs. Engelhard, Pollak, Pitcher & Stern (R. 20).

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allowed—many of them paid^o in part—in the proceeding brought for the liquidation of the domesticated United States branch of that company.

The creditors of the Insurance Company, though defendants, are not parties to the present appeal. For it was upon the motion of the Superintendent of Insurance alone that the judgment of dismissal here under review was obtained. The creditors, however, though not parties *pro forma*, are the persons whose rights and interests are really at stake here, for this appeal is holding up the payment of their allowed claims.

Statement of the Case

In 1925, in proceedings then begun for the liquidation of the United States branch of the Insurance Company, the Superintendent of Insurance of the State of New York took over its properties as liquidator. The cash and securities here involved were among the properties of that branch. In 1931, after the payment of the branch creditors and of the attachment lien creditors (R. 28-29) the New York Court of Appeals directed that all claims filed, whether by foreign or domestic creditors and which were then or thereafter found to be valid, should be paid.

The order and interlocutory judgment entered on the remittitur from the Court of Appeals (June 16, 1931; re-settled July 13, 1931) required that a "Reserve Fund for Filed Claims" should be set up sufficient to cover payment of the filed claims.² This reserve was expressly exempted from attachment or execution. After the setting up of this reserve and a further reserve for expenses of liquidation and taxes, the balance remaining was (1) for a period of four months to be subject to attachment by those creditors who had not theretofore filed their claims, and

²These creditors whom we represent were among those who had already filed their claims.

(2) any surplus thereafter was to go to a quorum of directors as representing the Company for the benefit of the stockholders.³

(There will be no surplus for shareholders. As explained in the Superintendent's brief, the surplus on hand will be exhausted by the allowed claims of creditors. See also complaint, par. 17 [R. 86-7].)

After the entry of the 1931 decree, the Superintendent of Insurance proceeded to take proof of claims, make evaluations and compute interest. His fourth and latest report, dated November 9, 1933 (R. 32), was confirmed by the New York Supreme Court on December 13, 1933 and the claims thus allowed were then paid as to principal (R. 32).

On November 16, 1933—over two years after the entry of the order and interlocutory judgment on remittitur and a week after the Superintendent's November 9, 1933 report working out the details was filed (R. 30-33)—the Soviet government was recognized and the Litvinov assignment made and accepted (R. 31).

A referee's report recommending allowance of some additional claims, and interest on all claims allowed, was confirmed by order of March 30, 1936; the Appellate Division of the New York Supreme Court affirmed on February 26, 1937 and the Court of Appeals on May 25, 1937 (R. 34, 35; *Matter of People [First Russian Insurance Co.]*, 250 App. Div. 711, no opinion; 274 N. Y. 545, no opinion).

³The principles are laid down in the opinion of Cardozo, C. J., writing for the unanimous court. *Matter of People (First Russian Insurance Co.)*, 255 N. Y. 415, 422-426. The order and judgment on remittitur is not printed in the record here. It appears at pages 37-42 of the record in *United States of America, petitioner, v. Louis H. Pink*, one of the three cases decided together, 296 U. S. 463. For the convenience of the Court it is reprinted in the Appendix, *infra*, pp. 23-30, see especially pp. 26-30.

Sixteen years ago the liquidation was started. Ten years ago the principles were laid down (255 N. Y. 415) applying the surplus funds held by the Superintendent to the payment of these creditors, all of whom had filed their claims prior to the entry of the order and judgment on remittitur in 1931. Only this appeal prevents the payment of the sums awarded and the completion of the liquidation, so far as these creditors are concerned (R. 42).

Argument

The principles applying here have all been settled in *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624 (affirming 280 N. Y. 286), rehearing denied 309 U. S. 697. The New York Supreme Court properly refused to give effect to a foreign transfer of property within its jurisdiction and held subject to its disposal, to the extent of destroying the rights of creditors who had been invited to file their claims against this property in New York (First Point).

The Litvinov assignment, under which petitioner claims, created no overriding federal rights. It did not purport to impair, and under the Fifth Amendment could not impair the rights of the creditors before the New York courts (Second Point).

FIRST

The New York courts have acted in accordance with established New York and American doctrine in applying property within their custody to the payment of foreign creditors whose claims have been filed and adjudged valid in the liquidation proceeding under former § 63 of the New York Insurance Law.

A. Every question arising in this case was settled in *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624 (affirming 280 N. Y. 285), rehearing unanimously denied 309 U. S. 697.

The New York Court of Appeals, in rendering the judgment of affirmance that is here under review declared (R. 71-2; 284 N. Y. 555) that this case had already been determined in principle by its decision in the *Moscow* case (280 N. Y. 286) and the affirmance of that decision by this Court (309 U. S. 624).

How thoroughly the *Moscow* case covers the points at issue here is shown by the arguments of counsel for the Government:

Thus, in opposing the motion for the dismissal of the complaint here—made pursuant to Rule 113 of the New York Rules of Civil Practice, and § 476 of the New York Civil Practice Act—the sole ground of opposition urged by Government counsel was that the *Moscow* case had not yet been decided by this Court (see affidavit in opposition to motion, R. 51).

And the Government's brief is merely an attempt to reargue the *Moscow* case. A significant illustration is the plea that all that is sought by the Government now is a recognition that the rights of the Soviet Government (and of the United States as its assignee) with respect to the surplus funds of the United States Branch of the First Russian Insurance Company, were those of a statutory successor of the Russian corporation (Government's

brief, pp. 9, 19, 58). For in the *Moscow* case there was express recognition of that status—an express finding that “upon nationalization, the Government, under Soviet laws, becomes the statutory successor and domiciliary liquidator of the nationalized and dissolved Russian companies” (Record, 309 U. S. 624, p. 124, finding-77)⁴. The *Moscow* case was decided against the Government’s contentions, despite that finding.

The decisions of the New York courts in the *Moscow* case and in the present case of the First Russian Insurance Company, represent the application of the governing principles used by the New York Court of Appeals over a period of years in interpreting the duties of the Superintendent of Insurance under § 63 of the Insurance Law of 1909 (L. 1909, ch. 33, as amended L. 1912, ch. 217; L. 1918, ch. 119). The principles so established are consistent with the whole body of New York and American doctrine.⁵

B. The rules worked out by the New York Court of Appeals over a period of years and culminating in the *Moscow* case, represent a consistent body of doctrine recognized as appropriate by this Court with respect to creditors’ rights in the New York courts against property situated in New York.

(1) The rights of alien friends to have recourse to the New York courts on their contract claims has been recognized for many years. *Russian Republic v. Cibrario*, 235 N. Y. 255, 259; *Sliosberg v. New York Life Insurance Company*, 244 N. Y. 482, 492; *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570, 578. When in our courts aliens

⁴This finding was stressed in the brief which the United States submitted in that case (Government brief in *Moscow* case, p. 150).

⁵Being the latest decisions of the highest state court, they would represent the state law on the subject even if they had been inconsistent with prior New York decisions. *Vandenbark v. Owens-Illinois Co.*, 311 U. S. 538, 541, 543; *Wichita Royalty Company v. City National Bank*, 306 U. S. 103, 109.

are entitled to the same protection as other creditors (*Russian Volunteer Fleet v. United States*, 282 U. S. 481, 491-2; *Hibernia Bank v. Lacombe*, 84 N. Y. 367, 385).

But for the liquidation proceeding, which provided a different mechanism, Yermaloff and other similarly situated creditors of the First Russian Insurance Company might have brought suit, attached, and been paid as was the creditor in *Murphy v. Second Russian Co.*, 240 N. Y. 554 (1925). Instead of attaching, these creditors, pursuant to invitation of the New York courts, filed their claims.⁶ As already stated, all those on whose behalf this brief is submitted had filed their claims prior to the entry of the order on remittitur.

(2) The property—out of which by the order of the Court a reserve fund was directed to be set up for the payment of those claims—consisted of cash deposited by the Superintendent in New York banks and securities in the Superintendent's possession, and was held by him subject to the direction of the New York Supreme Court. In 1931 the Court specifically directed the appropriation and setting aside of part of this property in a reserve for individuals who, pursuant to the invitation of the State, filed their claims. This proceeding was, as this Court has held,

⁶In the *Matter of People (First Russian Insurance Co.)*, 255 N. Y. 415, Cardozo, C. J., at 423 referred to those claimants (including the creditors whom we represent) whose proofs of claim had been "filed and diligently pressed." He said: "Creditors so proving were acting in response to a published invitation, published in accordance with the order of liquidation, to submit claims of every kind without reference to the place of origin, and were stayed in the meantime from a remedy in the courts." Declaring that "there would be manifest inequity if at this late date an ancillary receiver were to remit them to their legal remedies and thus compel them to prove anew", he required that a reserve be set aside to take care of their claims, and it was only after the setting aside of that reserve that the remaining surplus was to go (a) to creditors who had not then filed, and, after all creditors, (b) to the representatives of the stockholders.

"essentially in rem" (*United States v. Bank of New York and Trust Co.*, 296 U. S. 463, 475-6).⁷

(3) As to the *res* in its custody for administration, the New York Supreme Court was within its powers and jurisdiction in refusing to allow a transfer of title under Russian decrees to defeat creditors whose right to payment out of this fund—provided their claims were found valid—had already been adjudged. The propriety of thus applying the funds has, as we show *infra*, been expressly recognized by this Court.

(a) After the payment of the branch and attachment creditors, the New York courts properly proceeded with the liquidation of the remaining assets for the benefit of all creditors regardless of the origin of their claims.

The principle established by the Court of Appeals prior to the *Moscow* case is that under former § 63^s of the New York Insurance Law the Superintendent of Insurance, as statutory liquidator of a domesticated branch of a foreign insurance company, took possession of the local assets not solely for the security of local policyholders and creditors "but for the interest of all its policyholders, creditors and stockholders wherever they may be". *Matter of People (City Equitable Fire Insurance Co.)*, 238 N. Y. 147, 156; *Matter of People (Norske Lloyd Insurance Co.)*, 242 N. Y. 148, 165.

⁷"The important matter", wrote Chase, C. J., for the Second Circuit Court of Appeals, in the opinion below (77 Fed. [2d] 866, 869), "is that before this action was commenced the fund in controversy had been taken into the custody of the New York court and has ever since remained in its custody. The sole purpose of the proceeding in the New York Court was to liquidate the fund and distribute it according to its laws. To that end, the state suit was in rem."

⁸Subdivisions 4 and 5 of former § 63, dealing with the liquidation of foreign insurance companies doing business in New York, are now replaced by §§ 514-516 of the New York Insurance Law of 1939 (L. 1939, Ch. 882), § 516 having been amended by L. 1940, Ch. 631, § 2.

In cases of insolvency where there is a home liquidator who will distribute for all creditors alike, this principle has impelled the New York courts to transmit to him—"on appropriate conditions"⁹—any surplus not needed for payment of claims arising out of United States business (*City Equitable* and *Norske Lloyd* cases, *supra*). But where there is no insolvency and no liquidator at the domicile who will make equitable distribution there, the same principle permits creditors, regardless of the origin of their claims, to secure payment here out of the surplus funds held here and may further require complete distribution here. *Matter of People* (*First Russian Insurance Co.*) and *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, 423, 426.

The soundness of this procedure has been recognized by this Court. *Hughes*, C. J., in an opinion dealing with *this company, these funds and these creditors* (296 U. S. 463 at p. 476)¹⁰ held that the New York court, after the payment of domestic creditors and policyholders "still had control of the property and necessarily had the pertinent equitable jurisdiction to decide what should be done with it. In such a case, the court might direct that the surplus assets should be remitted to a domiciliary receiver—if there were one—on appropriate conditions. *Matter of People* (*Norske Lloyd Ins. Co.*), 242 N. Y. 148. Or the court might direct further liquidation in order to provide for the payment of other claims, if that course appealed to the sense of equity in the particular circumstances", citing Judge

⁹296 U. S. at 476.

¹⁰The opinion is captioned *United States v. Bank of New York and Trust Co.*—the case dealing with the surplus funds of the Moscow company. The same opinion covers also the case of *United States v. Pink*, wherein the Government sought to get control of the surplus funds of the First Russian Company, as in the present case of *United States v. Pink*. Pages 475 and 486 of the opinion explain the special circumstances of the *First Russian* liquidation proceedings.

Cardozo's opinion in the two cases of *Matter of People (First Russian Insurance Co.)* and *Matter of People (Russian Reinsurance Co.)*, 255 N. Y. at 423.¹¹

Specifically, as *Lehman, C. J.*, said in the *Moscow* case (280 N. Y. at 312): "No principle of law constrains us" to hold that "the suitors who at our invitation have come into court must be dismissed empty-handed; that we must remit the assets in our control to another sovereign to retain or distribute as it sees fit."

(b) In determining the rights of creditors, the Court in the *Moscow* decision¹² properly adopted the "recognized

¹¹The New York legislature has recently prescribed the same procedure wherever the United States branch of a foreign insurance company is in liquidation in New York. § 514, subd. 3 of the Insurance Law of 1939 now expressly provides that the liquidation of "the business of the United States Branch of an alien insurer having trustee assets in this state shall be in the same terms as those hereinbefore prescribed" (i. e., for the liquidation of domestic insurance companies), "except that only the assets of the business of such United States Branch shall be included therein."

¹²Judge Lehman pointed out that there were two questions involved: "first whether the Russian decrees were intended to have such (i. e., extraterritorial) effect, and, second, whether even if so intended the courts of this State will give them their intended effect" (280 N. Y. at 302).

The lower New York courts had found that the Russian decrees were not intended to reach out and affect the title to assets within the jurisdiction of the State of New York. Judge Lehman declared that these findings "rested upon a firm foundation" (280 N. Y. at 310).

But he also found that the second question as well as the first would have to be answered in the negative. At page 307 Judge Lehman said: "Certainly no decree monopolizing the business of insurance in Russia, taking over the conduct of the insurance business formerly conducted in Russia by insurance corporations, and terminating the obligations of such companies, could possibly have been intended to apply to business conducted here, or if so intended; could be binding here" (italics ours).

And his final declaration in affirming was (at 314): "The courts below have made the proper choice not because the enforcement of confiscatory decrees of property located elsewhere is contrary to our public policy, but because under the law of this State such confiscatory decrees do not affect the property claimed here" (italics ours).

rule that a state may rightly refuse to give effect to external transfers of property within its borders so far as they would operate to exclude creditors suing in its courts. *Harrison v. Sterry*, 5 Branch. 289; *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624; *Clark v. Williard*, 294 U. S. 211; *Barth v. Backus*, 140 N. Y. 230" (*Stone, J.*, in the minority concurring opinion in *United States v. Belmont*, 301 U. S. 324, at 335).¹³

The New York courts allowed effect to the decrees of the Soviet government insofar as they terminated the existence of the insurance company in Russia (280 N. Y. at 310, 314). But even so, they properly refused to destroy the rights of creditors who had been invited to file their claims against the debtor's assets held in custody here in New York by according to the Soviet government, as successor, a prior right to take this fund.¹⁴

(c) If the Insurance Company itself had transferred its assets voluntarily to the Russian government, the transfer could not have disturbed the jurisdiction *in rem* of the New York courts to apply these funds to the payment of these creditors.

¹³This was also in line with the Court of Appeals' prior decisions (*James & Co. v. Second Russian Insurance Co.*, 239 N. Y. 248, 257 and *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N. Y. 369, 378).

¹⁴Apposite is the language of *Cardozo, J.*, in *James & Co. v. Second Russian Insurance Co.*, 239 N. Y. at 257:

"As to the Soviet decree, we think its attempted extinguishment of liabilities is *brutum fulmen*, in England as well as here, and this whether the government attempting it has been recognized or not. Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum (*Barth v. Backus*, 140 N. Y. 230; *Matter of People [City Equitable Fire Ins. Co.]*, 238 N. Y. 147, 152; cf. *Matter of Barnett's Trusts*, 1902, 1 Ch. 847)."

Nor could the Russian Government as statutory successor claim greater rights. For if the Russian Government were claiming the funds as statutory successor for the purpose of making equal distribution among creditors it would still be within the jurisdiction of the New York courts, with physical possession of the assets, to decide whether they should proceed with the liquidation or whether they should turn over the assets to the Russian government.

"In respect of his subjection to the power of the local law" the position of a statutory successor "is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. *He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession*" (Cardozo, J., writing for the unanimous court in *Clark v. Williard*, 294 U. S. at 214; italics ours).

In *United States v. Belmont*, *supra*, Stone, J., wrote: "New York would have been free to enforce a local policy subordinating the Soviet Government, as the successor of its national, to local suitors. Its judicial decisions indicate that such may be its policy for the protection of creditors or others claiming an interest in the sum due."¹⁵

Accordingly, had the Russian decrees provided for normal liquidation instead of confiscation, the title created by those decrees could not, if the New York courts held otherwise, impair the rights of foreign creditors legitimately pursuing their remedies in New York: *Clark v. Williard*, *supra*; *United States v. Belmont*, *supra*; *United States v. Bank of New York and Trust Co.*, quoted *supra*, p. 9; Barth

¹⁵Citing

James & Co. v. Second Russian Insurance Co., 239 N. Y. 248, 257;

Matter of People (City Equitable Fire Ins. Co.), 238 N. Y. 147, 152;

Matter of Waite, 99 N. Y. 433, 448;

Vladivostoksky Ry. Co. v. New York Trust Co., 263 N. Y. 369.

v. *Backus*, 140 N. Y. 230, 239, 240; *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624, 629.¹⁶

C. The recognition of Soviet Russia did not affect the situation.

(1) With respect to the fund in question here, recognition could do no more than give the Soviet government the status of statutory successor of the First Russian Company. It could not increase the rights of a statutory successor as against a court with jurisdiction of the *res* concerning the distribution of the property among the creditors before it.

(2) Years before recognition, these ~~creditors~~ filed their claims. Not only that,—a state official had been directed to place property, under the jurisdiction and in the custody of the New York court, in a reserve fund, to be applied to the payment of those claims, principal and interest. Recognition could have no effect extraterritorially to divest property rights theretofore acquired in the State of New York. *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N. Y. at 378; *Guaranty Trust Co. v. United States*, 304 U. S. 140, 141; *Moscow Fire Insurance Co. v. Bank of New York and Trust Co.*, *supra*.

A disinterested commentator has said: "So far as the writer is able to establish, not a single court of a major country has ever, *either before or after recognition of the Soviet*, reached the conclusion that a Soviet decree pur-

¹⁶In New York the rule is the same whether or not the foreign creditors enforcing their remedies in New York against the assets of a foreign corporation are of the same domicile as that of the corporation. *Hibernia Bank v. Lacombe*, *supra*, 84 N. Y. at 375; *Barth v. Backus*, *supra*, 140 N. Y. at 239. This rule is recognized as the prevailing American doctrine in *Security Trust Co. v. Dodd, Mead & Co.*, *supra*, 173 U. S. at 629.

Yermaloff and substantially all other creditors on behalf of whom this brief has been submitted, were, at the time their claims were filed, non-residents of Soviet Russia.

porting to confiscate private property could affect any property other than that within Soviet Russia at the time of confiscation"¹⁷ (*italics ours*).

D. What has been said applies with even greater force to those claimants who are merely awaiting payment of interest.

In 1931, when the Court of Appeals decreed that the claims should be paid, with interest, it was applying a New York statutory rule which allows interest as an incident to recovery upon amounts due for a breach of contract, whether liquidated or unliquidated. New York Civil Practice Act, § 480; *Preston Co. v. Funkhouser*, 261 N. Y. 140, 142, affirmed 290 U. S. 163. The award of interest is strictly a matter of state policy:¹⁸ *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487; *Funkhouser v. Preston Co.*, *supra*, 290 U. S. at 167.

The New York courts having, in pursuance of their settled doctrine, made a thoroughly appropriate decision as

¹⁷Borchard, *Confiscations, Extraterritorial and Domestic*, 31 American Journal of International Law 675 (1937).

The same principle—the territorial limitation of confiscatory power—was the basis of decision in *Compania Espanola v. Navemar*, 303 U. S. 68, 75, where attempted appropriation of a Spanish ship by the recognized government of Spain was denied effect in the Admiralty Courts of the United States because the ship had never been surrendered to the Spanish Government, nor actually seized by that Government in its own territorial waters.

Oetjen v. Central Leather Co., 246 U. S. 297, referred to on nine separate pages of the Government's brief, has no application. For, as has been frequently recognized, it dealt with property situated within the confiscating state at the time it was seized. And on this ground the case has been distinguished from cases involving the questions with which we are concerned. (See, for example, *U. S. v. Belmont*, minority concurring opinion, 301 U. S. at 333.)

¹⁸The federal courts also allow interest in federal liquidations. *American Iron Co. v. Seaboard Air Line*, 233 U. S. 261, 266, 267; *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 527. On the allowance of interest as an essential element of compensation, see *Miller v. Robinson*, 266 U. S. 243, 257-8.

to the distribution of property in their custody—by applying it to the payment of creditors' valid claims—their disposition of the *res* must be respected. This would be so even where the conflicting decrees are those of sister states—jurisdictions whose decrees are *entitled* to full faith and credit. *Clark v. Williard*, 294 U. S. at 213, 214. It is true, *a fortiori*, as to foreign countries whose decrees are allowed effect only as a matter of comity. *Moscow Fire Insurance Co. v. Bank of New York and Trust Co.*, 280 N. Y. at 311-14.

This ground of decision does not depend on any "state policy against confiscation" nor does it raise any conflict between Federal and State policy on that subject (Specifications of Error, 1-7; Petitioner's Brief, 12-13). Nor does it interfere with anything that the Soviet government has done within its jurisdiction. Applicable to this case is the language of Mr. Justice Stone referring to the facts before the Court in *United States v. Belmont*, 301 U. S. at 333: "There is no question here of re-examining the validity of acts of a foreign state and no question of the United States' declaring and enforcing a policy inconsistent with one that the State of New York might otherwise adopt in conformity to its own laws and the Constitution."

SECOND

The Litvinov assignment created no overriding Federal rights. It did not purport to impair, and did not in fact impair, the rights of these creditors.

A. The Litvinov assignment conveyed only such rights as the Soviet government itself could have successfully asserted in our courts.

1. The United States took only what Russia had to transfer. *United States v. Buford*, 3 Pet. 12, 30; *New Orleans v. United States*, 10 Pet. 662.¹⁹ It took subject to any "preexisting infirmities". *Guaranty Trust Co. v. United States*, *supra*, 304 U. S. at 142. As *Lehman, J.*, stated in the *Moscow* case, 280 N. Y. at 304: The United States "invokes the aid of the court only to enforce the rights of the Soviet Government, whatever they might be, which the United States has acquired by assignment, to property within this State and subject to the law of the State."

2. The assignment states what Russia transferred: "The amounts admitted to be due or that may be found to be due" to the Russian Government "as successor of prior governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations * * *" (R. 36a).

These general terms may include a variety of things: claims for money deposited here by the Imperial Russian Government or the Provisional Russian Government (*State of Russia v. National City Bank*, 69 Fed. [2d] 44; cf. *Guaranty Trust Co. v. United States*, 304 U. S. 126); judgments in tort or contract actions brought here by those govern-

¹⁹"The nature and legal effect of any contract, indeed, are not changed by its transfer to the United States" (*United States v. Nashville, etc., Ry. Co.*, 118 U. S. 120, 125).

ments (*Lehigh Valley R. Co. v. State of Russia*, 21 Fed. [2d] 396, c. d. 275 U. S. 571); claims that had arisen out of its own business transactions here before recognition (*Russian Republic v. Cibrario*, 235 N. Y. 255) and local funds of extinct Russian corporations against which no beneficial rights are asserted in our courts (*United States v. Belmont*, 301 U. S. 324).

3. Nothing in the language of the assignment discloses an intention to transfer to the United States any of the property situated in New York free from the preexisting claims to which that property had been subjected by the prior judicial acts of that State. As this Court has said of this assignment: "There is nothing in either document (the assignment of Litvinov and the acceptance by the President) to suggest that the United States was to acquire or exert any greater right than its transferor, or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law" (*Guaranty Trust Co. v. United States*, 304 U. S. at 143).²⁰

So far as the language of the Litvinov assignment expressly touches the point, the indication is definitely the other way, for the Soviet Government agrees "not to make any claims with respect to . . . judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interest therein in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest" (R. 36a, 36b).

²⁰Where the United States intervenes to protect its interest in property administered by a court of equity "its rights must be adjudicated in recognition of the rights and demands of others interested in the same property." *United States v. Ansonia Brass Co.*, 218 U. S. 452, 472.

B. The Litvinov assignment and its acceptance did not set up an overriding federal policy.

1. Even if it were assumed that the Litvinov assignment and the paper accepting it could have provided for taking over this reserve fund in New York free and clear of the rights of creditors, quite obviously that was not done here.

(a) There was nothing, as we have seen, to show that the United States intended to enlarge whatever rights the Soviet Government had. There was none of the "conflict", "repugnance" or "irreconcilability" (*Hines v. Davidowitz*, 312 U. S. 52, 67) which is indispensable in showing that a treaty or federal law has overridden a state act. There is nothing, in short, to suggest that the United States, as assignee, could do more than "collect the claims in conformity to local law". *Guaranty Trust Co. v. United States*, quoted more fully, *supra*, page 17.

(b) Had the assignment contained language which would even have raised a doubt and thereby called for recourse to the principles of construction, the conclusion would be unchanged. For "even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them" (*Guaranty Trust Co. v. United States*, *supra*, 304 U. S. at 143; see also *Russian Volunteer Fleet v. United States*, 282 U. S. at 491, 492).

(c) These conclusions are in no wise affected by the decision in *United States v. Belmont*, *supra*, 301 U. S. 324. There the question was solely as to the sufficiency of a complaint which declared that the United States, under the Litvinov assignment, was entitled to money that had been placed on deposit with the defendant bankers by a Russian corporation. It did not appear that the bankers had any

interest in the matter "beyond that of a custodian" (p. 332). So far as the record disclosed, no creditors sought payment out of the deposit. The court did not pass upon—on the contrary, it specifically excluded—a situation in which the rights of creditors or other adverse claimants might be involved or impaired (p. 333):

"We do not consider the status of adverse claims, if there be any, of others not parties to this action. And nothing we have said is to be construed as foreclosing the assertion of any such claim to the fund involved, by intervention or other appropriate proceeding. We decide only that the complaint alleges facts sufficient to constitute a cause of action against the respondents (the bankers)."

(d) Government counsel say (Brief, 54):

"The controlling principle is that the Constitution forbids the states to take hostile action against a foreign power without the consent of the Federal government."²¹

No hostility to Russia is evinced by refusing to treat it more favorably than any other friendly country or than a sister state. There is nothing in the assignment to require that it be given any such preferential treatment. Certainly, there is nothing in the assignment to indicate that Russia could expect, or that the United States intended, that vested rights here in the United States would be destroyed or disregarded.

All that the United States agreed was to take what rights the Soviet Government had and to notify that Government of any sums "realized by the Government of the

²¹This is the same argument that was urged in the Government's brief in the Moscow case at 31, *et seq.*

United States" from the assignment to it of amounts that "*may be found to be due*" the Soviet Government. (Assignment, R. 36c, 36d; italics ours).

In the *Guaranty Trust Company* case, the United States made an argument similar to the one just quoted regarding the Litvinov assignment. The predecessor of the Soviet Government had made a deposit with the trust company. The trust company sought the protection of the Statute of Limitations. The United States contended (304 U. S. at 131) that "the statute is inoperative and ineffective since it conflicts with and impedes the execution of the Executive Agreement between the Soviet Government and the United States by which the assignment was effected." The court, noting that there was nothing in the Litvinov assignment or its acceptance to suggest "that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims", rejected the contention (at 136, 143).

2. If the Litvinov assignment had expressly stipulated what the Government contends it did, it would still not suffice to disturb the rights of these creditors, for they are vested rights of property (*Ettor v. Tacoma*, 228 U. S. 148, 156) which the Fifth Amendment protects against uncompensated destruction by the United States. *Meade v. United States*, 2 Ct. Cl. 224, 275; *Osborn v. Nicholson*, 13 Wall. 654, 662; *Lynch v. United States*, 292 U. S. 571, 579, 580; *Louisville Bank v. Radford*, 295 U. S. 555; 601-2.²²

The Fifth Amendment applies to friendly aliens as well as to citizens (*Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489, 491-2).

²²In the *Belmont* case this Court held that on the record before it no question of the Fifth Amendment was presented, but it was careful to say: "It does not appear that respondents [the banker defendants who had set up the defense that the United States had no title] have any interest in the matter beyond that of a custodian. Thus far, no question under the Fifth Amendment is involved" (301 U. S. at p. 332, italics ours).

The President's mandate is "to exercise his executive power *under the Constitution*" (*Myers v. United States*, 272 U. S. 52, 123, italics ours). Neither he nor Congress can give validity to a treaty provision that attempts what the Constitution expressly forbids (*The Cherokee Tobacco*, 11 Wall. 616, 621; *Geofroy v. Riggs*, 133 U. S. 258, 267). "Certainly a treaty" made by the United States "could not divest rights of property already vested in (within) the State, even if the words of the treaty imported such an intention," said Chief Justice Taney in *Prevost v. Greneaux*, 60 U. S. 1, 7, holding that the succession of a person dying in 1848 could not be disturbed by a treaty made in 1853 although the right of succession was not asserted until after the treaty.

This Court has consistently refused to construe the Litvinov assignment as being intended to interfere with creditors' rights against assets in the United States. (*United States v. Bank of New York and Trust Co.*, 296 U. S. at 478-480; *United States v. Belmont*, 301 U. S. at 332-3, 335-7; *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624; 309 U. S. 697.) And even if the question were here a question *de novo*, the same result would be required by the settled preference for constructions that do not raise constitutional problems. "Even the language of a treaty whenever reasonably possible will be construed" so as not to destroy rights previously vested under State law (expressly stated, as the rule for construing the Litvinov assignment, in *Guaranty Trust Co. v. United States*, 304 U. S., at 143, quoted *supra*, p. 18; and illustrated by the decisions in *Prevost v. Greneaux*, *supra*; *New Orleans v. United States*, 10 Pet. at 731).

With the demonstration that no Federal right was created by the Litvinov assignment which could override the disposition made of this fund by the New York courts,

Petitioner's suggestion that it may wish to re-litigate the claims and re-examine their validity and amount (Brief, pp. 10-12; especially footnote 2) is to be disregarded as irrelevant. No such ground for continuing the action is asserted in the affidavit opposing dismissal (R. 50-1).

This blithe suggestion is made *in 1941*; after these claims have been examined, found to be valid,²³ and their validity affirmed (in 1937) by the New York Court of Appeals (274 N. Y. 545). Contrast the considered opinion of Cardozo, C. J., written *in 1931*, that "there would be manifest inequity if at this late date an ancillary receiver were to remit them"—these very creditors—"to their legal remedies and thus compel them to prove anew" (255 N. Y. at 423).

CONCLUSION

The writ should be dismissed, or the judgment affirmed, on the authority of *United States v. Bank of New York and Trust Co.*, 296 U. S. 463, 478-480; *United States v. Belmont*, 301 U. S. 324, 332-3, 335-7; *Guaranty Trust Co. v. United States*, 304 U. S. 140, 142-3; *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624; 309 U. S. 697.

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of Counsel

²³It is to be assumed that the highly experienced persons to whom the duty of adjudication has been confided by the State of New York have carried it out "with honor and capacity" (*Arkansas Commission v. Thompson*, 313 U. S. 132, 139).

APPENDIX

Order and Judgment on Remittitur Entered on the Decision of the Court of Appeals of the State of New York, 255 N. Y. 415. (From United States v. Pink, 296 U. S. 463—Record on Appeal, 37-42.)

AT a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 13th day of July, 1931.

Present—Hon. WILLIAM T. COLLINS, Justice.

[TITLE AS BELOW.]

A motion having been made for an order resettling the order herein, dated and entered June 16, 1931, upon the remittitur of the Court of Appeals,

NOW . . . (Recital of Moving Papers omitted) it is

ORDERED that the said order of June 16th, 1931 be and the same hereby is resettled so as to read as follows:

AT a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 16th day of June, 1931.

Present—Hon. PHOENIX INGRAHAM, Justice.

In the Matter

of

The Application of THE PEOPLE OF THE STATE OF NEW YORK, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the

FIRST RUSSIAN INSURANCE COMPANY,
ESTABLISHED IN 1827,

and the interests of its policyholders, creditors, stockholders and the public.

ORDER ON REMITTITUR OF THE
COURT OF APPEALS.

The appellant First Russian Insurance Company Established in 1827, and the appellant G. Frank Dougherty and the appellant James A. Tillman, having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, First Department, dated May 29,

1930, and entered in the office of the Clerk of the said Appellate Division on June 11, 1930, which order modified and reversed in part and affirmed in part an order entered in the office of the Clerk of the County of New York on September 10, 1929, providing among other things, for the disposition of the surplus assets of the First Russian Insurance Company, Established in 1827, and said appeal having been argued at the Court of Appeals; and the Court of Appeals having on the 11th day of February, 1931, ordered, adjudged and decreed that the order of the Appellate Division of the Supreme Court so appealed from as aforesaid, and the order of the Special Term of the Supreme Court entered as aforesaid on September 10, 1929, be reversed; that an order be entered dissolving the injunction contained in the order directing liquidation; and that the surplus assets of the First Russian Insurance Company established in 1827 be transferred in accordance with its opinion; and the said Court of Appeals having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court of the State of New York to be proceeded upon according to law.

NOW, on reading the remittitur of the Court of Appeals, filed herein on the 1st day of May, 1931, and on reading the said opinion of the Court of Appeals, and upon reading and filing the notice of motion herein dated May 1st, 1931, and the affidavits of Frederick B. Campbell, verified May 1, 1931, Marc D. Ratner, verified April 22, 1931, and of Michael J. Imchanitzky, verified April 29, 1931, and proof of the service thereof, the replying affidavit of Frederick B. Campbell, verified June 9, 1931, the answering affidavit of John M. Downes, verified June 2, 1931, the affidavits of Frederic C. Pitcher, verified May 25, 1931, and of Boris L. Komar, verified May 25, 1931 it is

ORDERED, ADJUDGED AND DECREED:

1. That the order and judgment of the Court of Appeals be, and the same hereby are made the order and judgment of this Court:

2. That the order of the Appellate Division of the Supreme Court for the First Department, dated May 29, 1930, and filed and entered on June 11, 1930, in the office of the Clerk of said Appellate Division, be, and the same hereby is reversed.

3. That the order of the Special Term of New York County, entered and filed in the office of the Clerk of the County of New York on the 10th day of September, 1929, be, and the same hereby is reversed.

4. That the injunction contained in the liquidation order herein dated and entered August 8, 1925, as resettled by order dated and entered September 11, 1925, be, and hereby is vacated and dissolved.

5. That the Superintendent of Insurance of the State of New York be and he is hereby permitted, authorized and directed to pay all claims of domestic creditors in full with interest which are determined and which have not heretofore been paid; and all expenses of liquidation.

6. That the Superintendent of Insurance be and he is hereby directed to ascertain, fix and determine as soon as possible the amounts of any and all lawful and valid claims heretofore filed herein on which attachments were obtained prior to the order directing liquidation in the above entitled proceedings and as to such of said claims or debts as are found valid to pay the same in full with interest.

7. That the Superintendent of Insurance be and he is hereby permitted, authorized and directed as soon as pos-

sible after the entry of this order to pay in full with interest all claims heretofore filed in this proceeding, which have been determined and found by the Referee heretofore appointed herein to be valid debts or obligations of the First Russian Insurance Company, Established in 1827 or of its United States Branch, regardless of the fact that some or all of such claims may be of foreign origin and might have heretofore been classified as "foreign" claims or claims of the "second" or "third" class by the Superintendent of Insurance or by the said Referee.

8. That the Superintendent of Insurance be and he hereby is directed to ascertain, compute and report to this Court with his recommendations as soon as possible, the amount and validity of any and all other claims heretofore filed in this proceeding as to such of said claims as are found by him to be valid debts or obligations of the First Russian Insurance Company, Established in 1827, or of its United States Branch, to pay the same in full with interest, as and when directed by this court regardless of the fact that some or all of such claims may be of foreign origin and might have heretofore been classified as "foreign" claims or claims of the "second" or "third" class.*

9. The Superintendent of Insurance shall set aside and retain in his possession funds sufficient to pay all claims heretofore filed in full with interest; the funds so retained shall be known as the "reserve fund for filed claims."

10. In addition to the "reserve fund for filed claims," the Superintendent of Insurance shall set aside and retain

*Claims in connection with a United States branch of a Foreign insurance company were divided into three general classes: *First*, upon policies issued to residents or citizens by the United States branch; *second*, upon policies issued by the Company outside of the United States to persons residing within the United States; *third*, upon policies issued to non-residents of this country by foreign agencies of the insurance company. *Matter of People (Norske Lloyd Insurance Co.)*, 242 N. Y. 148, 155.

in his possession funds sufficient to pay; (1) all further reasonable expenses of liquidation; (2) all taxes which may then be due or become due to the Government of the United States and the State of New York; and the funds so set aside and retained shall be known as the "reserve fund for taxes and expenses of liquidation."

11. The surplus assets then remaining in the possession of the Superintendent of Insurance over and above the sums set aside and retained by him as and for the "reserve fund for filed claims" and the "réserve fund for taxes and expenses of liquidation," shall be known and described as the "accrued surplus fund" of the First Russian Insurance Company, Established in 1827 and its United States Branch, in the above entitled proceeding.

12. The "accrued surplus fund" as hereinabove defined and increment received thereon shall be held by the Superintendent of Insurance for a period of four months after the date of the entry of this order, for the purpose of and subject to attachment and/or execution by creditors or other persons, firms or corporations having claims against the First Russian Insurance Company, Established in 1827 or its United States Branch, which claims were not, prior to the date of the entry of this order, filed with the Superintendent of Insurance; and each and every creditor or other person, firm or corporation having or asserting such claims against the First Russian Insurance Company, Established in 1827, or its United States Branch, shall be permitted to maintain an action against said Company in the Courts of this State through levy of attachment or execution or otherwise against said "accrued surplus fund" in the manner provided by law.

13. After the expiration of the said period of four months after the entry of this order, the Superintendent of Insurance shall and he is hereby authorized and di-

rected to pay over to the First Russian Insurance Company, Established in 1827, as represented by a quorum of its board of directors, consisting of Leonid Davydoff, Count Alexandre Mordvinoff and Victor de Yermoloff, any balance of the said "accrued surplus fund" then remaining in his hands which has not been levied upon by virtue of warrant of attachment or execution.

14. The "reserve fund for filed claims" shall be held separate and apart from the "accrued surplus fund" and from any other funds or assets of the First Russian Insurance Company, Established in 1827 and its United States Branch, and said "reserve fund for filed claims" shall not be subject to levy by warrant of attachment or execution.

15. If any claim heretofore filed herein is disallowed and the disallowance thereof confirmed by a final order of the court, then the Superintendent of Insurance shall transfer the amount set aside for the payment of such disallowed claims to the "accrued surplus fund" and it shall thereupon become and be held and disposed of in the manner herein provided for the disposition of the said "accrued surplus fund."

16. If any claim heretofore filed is allowed in a reduced amount and the allowance in such reduced amount confirmed by a final order of the court, then the Superintendent of Insurance shall transfer the excess of the amount set aside for the payment thereof over and above the amount necessary to satisfy the claim in its then reduced amount to the "accrued surplus fund," and it shall thereupon become and be held and disposed of in the manner herein provided for the disposition of the said "accrued surplus fund".

17. After the final disposition of all claims heretofore filed herein either by payment thereof or by a final order

of the court confirming the disallowance thereof, the Superintendent of Insurance is authorized and directed to transfer to the "accrued surplus fund" any balance of said "reserve fund for filed claims" and any other funds or assets of the said Company then remaining in his hands after making reservation of funds sufficient to pay his proper charges and expenses; and said sums so transferred shall thereupon become part of the said "accrued surplus fund" and be held and disposed of in the manner herein provided for the disposition of the said "accrued surplus fund".

18. The Superintendent of Insurance is hereby directed to make and file within forty-five days from the date of this order an account of his proceedings as liquidator of the First Russian Insurance Company, Established in 1827 from March 7, 1929 down to the date of this order.

19. Any party to this proceeding may hereafter apply at the foot of this decree for such further relief as he may be advised.

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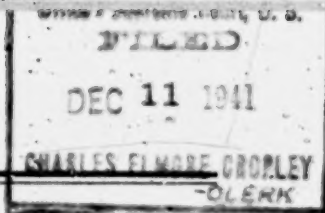
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FILE COPY

No. 42



IN THE
Supreme Court of the United States
October Term, 1941

UNITED STATES OF AMERICA.

Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State
of New York, and as Liquidator of the Domesticated
United States Branch of the First Russian Insurance
Company, Established in 1827.

Respondent,

VICTOR YERMALOF and others,

Defendants.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW YORK, NEW YORK COUNTY

**BRIEF FOR BRUSSENDORF, ET AL., AS
AMICI CURIAE**

BORRIS M. KOMAR,
Counsel for Brussendorf, et al.,
as Amici Curiae,
No. 295 Madison Avenue,
New York, N. Y.

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IN THE
Supreme Court of the United States

October Term, 1941

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; VICTOR YERMALOFF, and others.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW YORK, NEW YORK COUNTY.

**BRIEF FOR BRUSSENDORF, ET AL., AS
AMICI CURIAE.**

Statement.

This brief is filed on consent of the parties to this appeal by Brussendorf, Tillman and Kraut (R., 20-21), who are named as defendants in this action. Their claims against the First Russian Insurance Company have been finally adjudicated prior to the recognition of the Soviet Government by the United States (255 N. Y. 415). After recognition, these claims were again sustained on the merits by the New York Court of Appeals (274 N. Y. 595). The payment of these claims by the Superintendent is stayed pending the disposition of the Government's claim to all the American assets of said Company.

(Italics are ours, unless otherwise indicated.)

POINT I.

The Government cannot change on appeal to this Court the theory of its case in the State Courts and its basic contentions therein decided.

For the first time in this litigation, the Government asserts in its brief in this Court, as follows:

"The claim of the United States. Although, as stated above, the complaint prays that all assets remaining in the hands of the respondent after the payment of domestic creditors be turned over to the United States, the only relief presently sought is that the United States be recognized as the successor to the title and interest of the First Russian Insurance Company" (at p. 9).

In its complaint the Government squarely asserted that it seeks

"(4) That this Court adjudge and determine that the plaintiff is the sole and exclusive owner entitled to immediate possession of the entire surplus fund, and direct the Superintendent of Insurance to act for and to pay over to the plaintiff the entire surplus fund" (R., 36).

The Court of Appeals, in the opinion, said:

"We are agreed that without again considering such questions this court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here" (R., 71-72).

The Government must stand or fall upon the issue

whether or not it is entitled to all the assets of the First Russian Insurance Company at the present time (*Hull v. Burr*, 234 U. S. 712; *Ehman v. Gothenburg*, 200 Fed. 564; *Brockenbrough v. Champion Fibre Co.*, 176 Fed. 840; *Mesa Market Co. v. Crosby*, 174 Fed. 96; *McSherry Manufacturing Co. v. Dowcagiac Manufacturing Co.*, 163 Fed. 34).

The attempted change of the Government's claim had been forced by the insistence of the Superintendent of Insurance, that even if the Government were entitled to the surplus American assets of the First Russian Insurance Company, its claim is premature, as at present there is no ascertainable surplus of these assets. The adjudicated claims of the creditors of the First Russian Insurance Company have not been paid. It may well be that after these payments, and the payment of administration expenses, there will be no surplus assets left of said Company in the hands of the Superintendent of Insurance.

It is because the Government found itself faced with this undisputable fact, that it brought its action before there is such ascertainable surplus, that it now attempts to argue that it must be allowed to watch the distribution of the American assets so as to protect its possible and tentative future interest.

In the first place, the claims of the creditors of the First Russian Insurance Company cannot be determined in the Government's action. These claims have been already adjudicated by the Court of final resort in New York (255 N. Y. 415; 274 N. Y. 595) in the State liquidation proceedings in rem to which the Government was not a party. The time to appeal from said decisions had long expired, and these claims became final and non-appealable judgments in rem against the First Russian Insurance Company and the New York Superintendent of Insurance, as State Liquidator of its American assets.

In interpreting its earliest decision with regard to the

claims of these creditors (255 N. Y. 415), made in 1931, the Court of Appeals said *In the Matter of Tillman*, 259 N. Y. 133, that their " * * " right to recover had been established and the litigation was terminated except for computation by a referee of the amounts due " * * " (p. 135). After recognition, the Court of Appeals again sustained these judgments and held that full interest was payable thereon (274 N. Y. 595).

In the second place, no change in these decisions had been effected by the recognition of the Soviet Government by the United States in 1913.

In *Guaranty Trust Co. v. United States*, 304 U. S. 126, this Court unanimously said at pages 140-1:

"The Government argues that recognition of the Soviet Government, an action which for many purposes validated here that government's previous acts within its own territory, see *Underhill v. Hernandez*, 168 U. S. 250; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Kicaud v. American Metal Co.*, 246 U. S. 304; *United States v. Belmont*, 301 U. S. 324; *Dougherty v. Equitable Life Assurance Co.*, 266 N. Y. 71, 84, 85; *Luther v. Sagor & Co.*, 3 K. B. 532, operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded. This is tantamount to saying that the judgments in suits maintained hereby the diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government. *The argument thus ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. * * **

"We conclude that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition."

In *State of Russia v. National City Bank*, 69 Fed. (2nd) 44, the Court (C. C. A., 2nd) said at page 48:

"Moreover, it is apparent that the intent was to assign all the claims of the Soviet Government to the United States, and it is agreed to leave undisturbed diplomatically final non-appealable judgments and decrees of the American courts touching Russian affairs, and non-judicial acts done in good faith by and with the officials of the previously recognized government of Russia."

And accord:

Lehigh Valley R. Co. v. State of Russia, 21 Fed. (2nd) 396, 401, 402;

U. S. v. Trumbull (D. C.), 48 Fed. 99, 104.

POINT II.

The State Courts decided this case, not on grounds of local public policy, but upon the state rights acquired by express contract between the State and the First Russian Insurance Company.

Careful perusal of the opinion of the Court of Appeals in the *Moscow Fire Insurance Co. v. Bank of New York & Trust Co.* (280 N. Y. 286) case shows that it placed its decision not on the basis of any local public policy, but upon the construction of the State statute permitting foreign insurance corporations to do business in the State of New York, holding that under that statute, a foreign

insurance corporation obtaining permission to operate a United States branch under the New York Insurance Law, thereby consents and expressly agrees that the laws of its domicile shall not be applicable to its American assets, until such time as the State of New York releases these assets for delivery to its foreign corporate domicile. The Court said at pages 307, 308, 309, 310, 312, 313 and 314:

"We deal here with a class of property and a juristic person sui generis. Certainly no decree monopolizing the business of insurance in Russia; taking over the conduct of the insurance business formerly conducted in Russia by insurance corporations, and terminating the obligations of such companies could possibly have been intended to apply to business conducted here, or if so intended, could be binding here. *This State by its own laws determines what organizations shall be permitted to conduct the business of insurance here, what capital or security shall be required, and in other respects how such business shall be conducted. Certainly no foreign government may decree that it will take over the business here conducted by a corporation approved by this State, and cancel or change obligations to be performed here by such corporations.* * * *

"It is the property which at all times has been within the State of New York. As the referee has found, it has always been held by and the legal title thereto vested in trustees resident in and citizens of the United States'. It has always been subject to the control of the Insurance Department and in a practical sense has always been in the custody of the State. At no time could the insurance company or the Russian government have transferred it to Russia. In strongest sense its situs was in this State, and the control of this State complete. * * *

"The Insurance Law requires that before a foreign

insurance corporation is permitted to do business here there must be a definite separation and division of its property and even of its juristic personality. 'The Insurance Law, as now written, and as an entirety, indicates a purpose and policy in dealing with foreign insurance companies doing business in this country which are so definite and plain that they fix upon the words under consideration an interpretation which cannot fairly be avoided. We think that the Legislature in allowing these foreign companies to do business in this state and country intended to treat the domestic agency largely as a *complete and separate organization*; to place it on a parity with domestic corporations; to supervise and regulate it as such; and to require it by the deposit of prescribed assets to *set up within this country a capital corresponding to that of domestic corporations*, and which should be security for business transacted by it here and not elsewhere.' *Matter of People by Stoddard, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 158, 151 N. E. 159, 162. (Italics are new.) Thus the property of the United States Branch of a foreign insurance company acquired a character of its own. That character is 'dependent upon the law of this State. The property from its nature is subject to the laws of this State, and both the property and the 'complete and separate organization' analogous to a domestic corporation are immune from the control of any foreign power. No rule of comity and no act of the United States government constrains this State to abandon any part of its control or to share it with a foreign State. * * *

"Juridical concepts may be important factors in determining legal rights and obligations when concepts and obligation are parts of a consistent system of jurisprudence. The corporate 'fiction' of a single

artificial juristic person cannot be applied with unrelenting logic where one sovereign endows the corporation with life and another sovereign permits a branch of the corporation to do business only as a 'complete and separate organization.' * * *

"The property claimed here was in all respects subject to the law of this State. Though the courts of this State are bound to give effect to the decrees of the Soviet government in so far as these decrees terminated the existence of the company in Russia, they might still proceed with the liquidation of the property in their custody here, the creation of the Insurance Law, as a complete and separate organization, as such branches had always for many purposes been treated. As long as the parent company existed it would under the law of this State have certain residual rights in the property of the branch after the branch was liquidated. Those rights arose out of the relationship of parent corporation and branch. *The extinction of the parent company by the decrees of the Soviet government has eliminated the parent company and destroyed that relationship. A new situation has arisen which must be met in accordance with the law of this State.* The courts, giving effect as they must to the extinction of the parent company, must determine whether the parent company's residual right to property here passes by confiscatory decree to the sovereign who extinguished the parent corporation or whether under the law of this State such rights have passed to the stockholders and foreign creditors who, in answer to an invitation extended to them by this State, have come in and proven their claims in accordance with a procedure devised by this court to 'conform' to justice and equity' as those terms are understood here. *The courts below have made the proper choice, not be-*

*cause enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy, but because under the law of this State such confiscatory decrees do not affect the property claimed here."*¹

The above statement of law is in accord with many American authorities. See: *Beale, Treatise on the Conflict of Laws*, 1935, Vol. 1, pp. 320-321, 382-391; Vol. 2, pp. 777-784; *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 408; *Finney v. Nelson*, 183 U. S. 144, 150; *Thomas v. Mattiesen*, 32 U. S. 221, 234, 235.²

¹In his annual report to the New York legislature for 1915, the Superintendent of Insurance said that: "* * * under our statutes, therefore, the United States branches transact business as quasi entities rather than as parts of their parent corporations" (N. Y. Ins. Report, part 1, Fire and Marine, 1915, p. 40).
In 1916 Cardozo, J., said in *Comey v. United Surety Co.*, 217 N. Y. 268, pages 273-4:

"This defendant is a foreign corporation, but its franchise to act as a corporation does not empower it to transact the business of insurance in this state. It must subject itself to our laws, it must obtain the license of our government, or its business becomes illegal (Insurance Law, Sec. 9; L. 1909, ch. 33; Consol. Laws, ch. 28). * * * We think that a foreign corporation thus licensed under our own laws may not with reason be held to be absent from our state. It owes to the law of its creation its franchise to be a corporation, but it owes to the law of this state the privilege of doing business within our borders. In exercising that privilege it may be dealt with as if it were in truth a domestic corporation. This view of its position has support in recent decisions. In *Morgan v. Mutual Benefit Life Ins. Co.* (189 N. Y. 447, 454) we held that for many purposes a foreign insurance company, transacting business here, must be 'treated as a domestic insurance company and as domiciled in this state'."

²"A foreign corporation may, of course, do nothing which is contrary to the law of the State in which it acts. If, therefore, a law of the State forbids or regulates the acts of a foreign corporation, the law must be obeyed." (Beale, Vol. 1, pp. 789, 780, citing inter alia *Warner Co. v. Forshay Co.*, 57 Fed. [2nd] 656, cert. den. 286 U. S. 558; In re

In *Pinney v. Nelson*, supra, a conflict arose between the laws of corporate domicile of a Colorado corporation and the laws of California, where the corporation operated. This Court said at page 150:

"Not content to rely upon the general authority which by the rules of comity the Colorado corporation would have to enter California, and transact business therein, they in terms set forth that a part of the purpose of incorporation was a transaction of business by the corporation in California. Now when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that State? * * * *How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California?*"

It is a settled doctrine in this country that the power of the State over the acts of foreign corporations and their assets is much broader than that over domestic corporations. In *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, this court said at page 43:

"In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. *It has even a broader application to foreign corporations.*"

The extent of the State power over the operations and assets of foreign corporations doing business in its territory has been recently defined by this Court with regard to a conflict between the laws of the corporate domicile of a Connecticut corporation and those of Missouri, where the

corporation operated. In *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, this court said at page 495:

"An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the State, it must do so subject to such valid regulations as the State may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot for that reason alone be disregarded; for, it is the province of the State, by its legislature, to adopt such a policy as it deems best, provided it does not, in doing so come into conflict with the Constitution of the State or the Constitution of the United States."

And see to the same effect:

Cable v. U. S. Life Insurance Co., 191 U. S. 288, 307;

N. Y. Life Insurance Co. v. Cravens, 178 U. S. 389, 396, 401.

This Court also unanimously upheld the power of the New York Courts to continue the administration of the New York assets of the Russian insurance companies, even after the payment of the local creditors. It said in *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463 at page 476:

"When the statutory trust was satisfied by the payment of domestic creditors and policyholders, it did not follow that the remaining assets were automatically released and the state court was ipso facto shorn of its jurisdiction, the court still had control of the property and necessarily had the pertinent equitable jurisdiction to decide what should be done with it. In such a case the court might

direct that the surplus assets should be remitted to a domiciliary receiver—if there were one—on appropriate conditions. *Matter of People (Norske Lloyd Insurance Co.)*, 242 N. Y. 148. Or the Court might direct further liquidation, in order to provide for payment of other claims, if that course appealed to the sense of equity in the particular circumstances. *Matter of People (Russian Reinsurance Co.)*, 255 N. Y. 415.”

This is precisely what the government is now contending the State of New York and its Courts had no power or authority to do, but should be compelled to terminate the liquidation and hand over the assets of the First Russian Insurance Company to the United States Government as a successor of the parent company in Russia, now claimed lawfully represented by the Soviet Government.

In the recent case of *Russian & English Bank v. Baring Bros. Ltd.*, L. R. (1936), A. C. 405, the House of Lords was called to consider a conflict between a section of the British Companies Act enacted in 1929, providing for the liquidation of the assets of any foreign company located in Great Britain where such foreign company “has been dissolved or otherwise ceased to exist” under the laws of its corporate domicile. In sustaining the provisions of the English Act as controlling the disposition of the English assets of Russian & English Bank, a Russian corporation, as against the provisions of the Soviet liquidation decrees relating to the Russian banks, Lord Aitken said at page 409:

“There is nothing abnormal in such a provision. The municipal law of this country, as of other countries, accepts the principle of international law that countries ordinarily accept the existence of juristic persons brought into being or recognized as existing in their country or origin. Similarly, they accept the destruction or cessation of such a juristic per-

sonality under the law of its country of origin. But if the municipal law choose, it may, in defined conditions, refuse to accept, or may accept only under conditions, either the creation or destruction of a foreign juristic person. Whether it has done so is for the Municipal Courts to decide, but if it has, then the Municipal Court must accept the situation. I see nothing incongruous in the Legislature saying, in effect: we accept the existence of a foreign corporation coming to trade in this country; we shall only impose a condition of registration. But if the corporation does trade here, acquires assets here, and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable, it may be wound up here so that its assets here shall be distributed among its creditors (I do not stay to consider whether its English creditors or creditors generally), and for the purpose of winding up it shall be deemed not to have been dissolved, for that event would defeat our municipal provisions for winding up a corporation. This does not seem to me to be recreating or reconstituting a new corporation. It is for particular and limited purposes refusing to recognize the dissolution of the old."

True, the House of Lords based the right to regulate the assets of foreign corporations within British territory upon the power reserved in the State's right to permit registration and operation of foreign corporations in its territory. It held that this power necessarily included the right to control the disposition of the assets of the foreign corporation within the British territory, not only while it is operating there, but even after it ceased to exist or operate anywhere. As no laws of corporate domicile can effect or regulate the power of a foreign state to permit registration of foreign corporations in its territory, no power in a foreign

state over its corporations could regulate the final disposition of the assets of this foreign corporation in another state.

New York Court of Appeals preferred to place the power of the State to control the assets of foreign corporations, even after their dissolution at their corporate domiciles, upon the implied or expressed consent of these corporations when they enter the state to exempt their assets brought within the jurisdiction of the State of New York for the purpose of operating a United States branch from any effect of the laws of their corporate domicile and to subject them exclusively to the control and authority of the laws of New York. We prefer the reasoning of New York court to that of the House of Lords because it is based on voluntary submission and eliminates any possible discussion of the extent and limitations of the reserved State power relied upon by the House of Lords. If the foreign corporation expressly or impliedly consents when it comes to operate in the State of New York, that its assets within the State of New York should be exempted from the operation of its domestic laws and be subjected to the laws of the State of New York, its government cannot, thereafter, object to or question the application of the laws of New York to the New York assets of such foreign corporation.

The right of the State of New York to liquidate the assets of Russian insurance companies operating under its insurance law in accordance with its provisions and contrary to the provisions of the Soviet liquidation decrees seems indisputable in the light of the treatment afforded in other countries of the world to assets of Russian corporations doing business in foreign countries.

The British Government recognized the Soviet Government on February 1, 1924. Despite the recognition of Soviet law dissolving Russian corporations [*Lazard Bros.*

& Co. v. *Midland Bank, Ltd.*, L. R. (1933) A. C. 289; *In re Russian & English Bank*, L. R. (1932) 1 Chan. 663], the British Government enacted in 1929 an amended Companies Act (Part X, subd. 2, Sec. 338).³

Under the provisions of this Act, numerous branches of Russian corporations in England were liquidated by the British courts [*Russian & English Bank v. Baring Bros., Ltd.*, L. R. (1936) A. C. 405; *In re Russian Bank for Foreign Trade*, L. R. (1933) Chan. 745; *In re Tea Trading Co.*, L. R. (1933) Chan. 647; *In re Russo-Asiatic Bank*, L. R. (1934) 1 Chan. 720]. In *Baring Bros.* case, Lord Blanesburgh supplied the reason for the refusal of the British courts to recognize Soviet confiscation of corporate assets under the nationalization decrees, stating that " * * * it is ignored because any dissolution without a winding up previously completed and with creditors unpaid is an offense, an injustice, to these creditors if it be permitted to defeat their claims against the company" (p. 407).

France recognized the Soviet Government on October 26, 1924. Despite said recognition, the French courts assumed under Article 2 of the French bankruptcy law jurisdiction over the branches of Russian corporations operating in France, and proceeded to liquidate them for the benefit of

³ The section reads:

"Where a company incorporated outside of Great Britain has been carrying on business in Great Britain, it may be wound up as an unregistered company under this part of the Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated."

Similar laws were passed in Esthonia on October 27, 1920 (*Zeitschrift fuer Ostrecht* [1927], p. 1539), in Latvia on January 17, 1921, April 17, 1921 and September 16, 1927 (*Zeitschrift fuer Ostrecht* [1927], p. 56, and in Poland on March 22, 1928 (*Zeitschrift fuer Ostrecht* [1928], p. 1116).

creditors and stockholders and not in accordance with the Soviet confiscatory decrees. [*Re Russo-Asiatic Bank* (56 Clunet [1929], pp. 78, 1095); *Re Banque Internationale de Commerce de Petrograd* (62 Clunet [1935], p. 125; *Re Banque Russe pour le Commerce Etranger* (62 Clunet [1935], p. 128); *Re Societe de Banque de Volga Kama* (62 Clunet [1935], p. 125); *Re Banque d'Azoff-Don* (62 Clunet [1935], p. 134)].

POINT III.

The State of New York has constitutional power to decline enforcement of transfer of title to the American assets herein involved as contrary to its public policy.

The title to the Government's claim here for the American assets of the First Russian Insurance Company, as set forth in its complaint⁴ is based solely and exclusively upon

⁴8. In 1918 and thereabouts, the Russian Government, by its laws, decrees, enactments and orders including among others a decree dated April 18, 1918, regarding the registration of securities, a decree dated November 28, 1918, on the organization of the insurance business, a decree dated March 4, 1919, on the liquidation of state enterprises, and a decree of November 18, 1919, on the annulment of life insurance contracts, among others, proclaimed the business of insurance in all of its forms to be a monopoly of the Russian State; dissolved, terminated and liquidated all Russian insurance companies and organizations; nationalized all of the property and assets of every kind and where-soever situated of all Russian insurance companies and organizations; discharged, cancelled, extinguished and annulled all of the debts and liabilities of all Russian insurance companies and organizations; discharged, cancelled, extinguished and annulled the shares in, and the rights of all shareholders in and to, all the property and assets of all Russian insurance companies and organizations, and discharged, cancelled, extinguished and annulled all of the obligations and liabilities of all insurance companies and organizations to all of their shareholders (R., 23-4).

the Soviet confiscatory decrees purporting to convey and assign by the operation of Soviet law all the assets of the First Russian Insurance Company to the Soviet Government. (fols. 68, 70, 72, 92-4).

This Court unanimously construed the transaction involved in the Roosevelt-Litvinov agreement as merely transferring to the United States Government the rights of the Soviet Government. It said in *Guaranty Trust Co. v. U. S.*, 304 U. S. 126:

"There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor * * *."

The purported transfer of all the assets of the First Russian Insurance Company to the Soviet Government by operation of its laws, was a statutory assignment thereof in invitum of the owner. An assignment is a contract (*Fourth Street Bank v. Yardley*, 165 U. S. 634, 644-6, 650, 652-3; *Commercial Bank v. Rufe*, 92 Fed. 789, 795; *In re Hollins*, 215 Fed. 41, 43).

10. As a result of said duly enacted laws, decrees, enactments and orders of the Russian Government, the said cash, securities and other assets of the insurance Company in the United States and in the State of New York became the property of the Russian Government and remained the property of the Russian State at all times up to November 16, 1933, as hereinafter set forth (R., 24).

19. On November 16, 1933, by an agreement as set forth in an exchange of diplomatic correspondence between the President of the United States and the Commissar for Foreign Affairs of the Union of Soviet Socialist Republics coincident with diplomatic recognition of the Soviet Government by the United States Government, a copy of which correspondence is annexed as Exhibit 1 to this complaint and made a part hereof as if set forth in full herein, the Union of Soviet Socialist Republics assigned to the plaintiff all amounts admitted to be due of that may be found to be due to the Union of Soviet Socialist Republics, including the entire said surplus assets involved in this action. Since November 16, 1933 the plaintiff has been and now is the sole and exclusive owner and entitled to immediate possession of the said surplus assets (R., 31-2).

In a decision rendered this year, this Court unanimously held that the States within the American Union have constitutional power to refuse enforcement of foreign contracts if contrary to their public policy.

In *Griffin v. McCooch*, 313 U. S. 498, this Court said at page 506:

"If upon examination of the Texas law it appears that the courts of Texas would refuse enforcement of an insurance contract where the beneficiaries have no insurable interest on the ground of its interference with local law, such refusal would be, in our opinion, within the constitutional power of the Texas courts. Rights acquired by contract outside a state are enforced within a state, certainly where its own citizens are concerned, but that principle excepts claimed rights so contrary to the law of the forum as to subvert the forum's view of public policy. Cf. *Loucks v. Standard Oil Co.*, 224 N. Y. 99. It is 'rudimentary' that a state 'will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or, in other words, violate the public policy of the state where the enforcement of the foreign contract is sought'. *Bond v. Hume*, 243 U. S. 15. Applying that reasoning this court affirmed the said court in following Texas' decisions which refused to enforce a valid foreign contract of guarantyship against a married woman. *Union Trust Co. v. Grosntan*, 245 U. S. 412. Likewise state courts have been upheld in refusing to lend their aid to enforce valid foreign contracts which required the doing of prohibited acts within the state of the forum. *Bothwell v. Buckbee, Mears Co.*, 275 U. S. 274. Where this court has required the state of the forum to apply the foreign law

under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy. *Bradford Electric Co. v. Clapper*, 286 U. S. 145; *Hartford Indem. Co. v. Delta Co.*, 292 U. S. 143. The rule was not applied where the parties to the contract acquired rights beyond the state's borders with no relation to anything done or to be done within the borders. *Home Ins. Co. v. Dick*, 281 U. S. 397."

POINT IV.

In the absence of any violation of Federal constitution, this Court is bound by construction of New York statute made by the New York Court of Appeals.

Concededly, what is involved in this case is the correct interpretation of the New York Insurance Law (Sections 42, 515) relating to the conditions surrounding the permission by the State of New York to foreign corporations to operate within the State. The statute is not compulsive, inasmuch as no foreign insurance corporation is forced by the State of New York to enter the State and do business therein, if the terms of that statute are not acceptable to it. It is a purely voluntary act on the part of a foreign corporation to accept the conditions of the New York statute under which it is permitted to operate within that State. The First Russian Insurance Company is not a citizen of the United States, and is not entitled to the protection of those sections of the Federal Constitution that relate to privileges of our citizens.

It is not claimed that the New York Insurance Law in any way violated any treaties between the United States and Russia. A bold claim is advanced that the New York Court of Appeals, the highest Court of the State, erroneously construed the State statute.

Until this day, this Court consistently adhered to the

doctrine that it has no power to adopt another construction of the State statute, not affecting any Federal right, even if it believed that the construction made by the highest State Court is erroneous. This Court always recognized that it was bound by the construction placed upon the State statute by the State's highest Court (*State Tax Commission v. Van Cott*, 306 U. S. 511; *Senn v. Tile Layers Protective Union*, 301 U. S. 468; *Atchinson, T. & S. R. R. Co. v. Railroad Commission*, 283 U. S. 380; *Saltentall v. Saltentall*, 276 U. S. 260; *Supreme Lodge, etc. v. Meyer*, 265 U. S. 39; *American Ry. Express Co. v. Royster Guano Co.*, 273 U. S. 274; *State of Missouri v. North*, 271 U. S. 40; *Keith v. Johnson*, 271 U. S. 1).

Although the decision of the New York Court of Appeals in *Moscow Fire Insurance Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286, has not changed (supra, footnote 1, at page 9) the interpretation of the New York Insurance Law as it was known in New York for almost a quarter of a century prior to that decision, this Court, recently interpreting its rulings in *Eric R. Co. v. Tompkins*, 304 U. S. 64, squarely held that the Federal Courts must apply the latest interpretation of the State statute made by the State Court, even if this interpretation represented a change in the opinion of the State Court, as compared with its prior decisions on the same statute.

In *Moore v. Illinois Central R. Co.*, 312 U. S. 630, this Court said at page 633:

"But the Circuit Courts of Appeals do not have the same power to reconsider interpretations of State law by State courts as do the highest courts of the State in which a decision is rendered. The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not, and in the absence of a change by the Mississippi legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of lim-

itations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute. *Wichita Royalty Co. v. City National Bank*, 306 U. S. 103, 167; Cf. *West v. American Telephone and Telegraph Co.*, 311 U. S. 223; *Fidelity Union Trust Co. v. Field*, 311 U. S. 169."

POINT V.

There is no conflict between the Federal and State law, as under the unanimous construction of the Litvinov Agreement by this Court, the Government is merely a successor to the rights of the Soviet Government acquired under Soviet law.

The construction of the Litvinov agreement was made authoritatively by this unanimous Court in *Guaranty Trust Co. v. U. S.*, 304 U. S. 126, where this Court, in the opinion by the present Chief Justice, said at page 135:

"The agreement and assignment are embodied in a letter of Mr. Litvinov, People's Commissar of Foreign Affairs of the Soviet Government, to the President and the President's letter of the same date in reply. * * *

"There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to

override state laws or to impair rights arising under them. *United States v. Arredondo*, 6 Pet. 691, 748; *Haver v. Yaker*; 9 Wall. 42, 44; *Dooley v. United States*, 182 U. S. 223, 230; *Nielson v. Johnson*, 279 U. S. 47; 52; *Todok v. Union State Bank*, 281 U. S. 448, 454."

See also *United States v. Bank of New York & Trust Co.*, 10 Fed. Supp. 269, 271-2.

No argument may change the plain language of the Roosevelt-Litvinov agreement. Merely because it confers upon the United States Government by an assignment the enforcement of rights allegedly existing in the Soviet Government, no new right was created in the United States Government. The agreement merely served as a conduit of rights derived by the Soviet Government either from its acts or some law. Such reflected right is not a federal right or privilege. (*Puerto Rico v. Russell & Co.*, 288 U. S. 476, 483; *U. S. v. Weld*, 127 U. S. 51, 57.)

Nor would the contention that the Government's alleged title to the American assets of the First Russian Insurance Company is based on the treaty as a federal law, aid it.

The Roosevelt-Litvinov agreement commands no higher power than a congressional statute (*Rainey v. U. S.* 232 U. S. 310, 316; *U. S. v. Lee Yen Tai*, 185 U. S. 213, 220-1; *Horner v. U. S.*, 143 U. S. 570, 578; *Whitney v. Robertson*, 124 U. S. 190, 194). Neither the treaty nor a Federal statute can authorize that which the Federal Constitution forbids (*Asakura v. Seattle*, 265 U. S. 332, 341; *Thomas v. Jay*, 166 U. S. 264, 271; *Geofroy v. Riggs*, 133 U. S. 258, 267; *The Cherokee Tobacco*, 11 Wall. 616, 620-1; *Doe v. Braden*, 16 How. 635, 657).

The Federal Constitution (the Fifth Amendment) does not permit the Federal Government to take private property within the United States without compensation under color of any Federal right.

Alien property within the United States, equally with the property of citizens, is within the prohibitions of the Federal Constitution (*Truax v. Rajch*, 239 U. S. 233, 239; *U. S. v. Wong Kim Ark*, 169 U. S. 649, 695; *Wong Wing v. U. S.*, 163 U. S. 228, 242; *Yick Wo v. Hopkins*, 118 U. S. 356, 369). The prohibition of the Fifth Amendment to the Federal Constitution binds the Government with regard to the property of aliens in the United States (*Russian Volunteer Fleet v. U. S.*, 282 U. S. 481, 491, 492).

In *Guaranty Trust Co. v. U. S.*, *supra*, this Court said at page 134:

"* * * We can find nothing in the agreement and assignment of November 16, 1933 which purports to enlarge the assigned rights in the hands of the United States * * *"

In *U. S. v. Manhattan Co.*, 276 N. Y. 396, the Court, also construing the Roosevelt-Litvinov Agreement, said at pages 406 and 407:

"The plaintiff here, as assignee of the Soviet government, holds no greater title and stands in no better position than its assignor."

The position of the Soviet Government and its assignee, the United States Government, in enforcing the claims of the Soviet Government, in our courts is merely that of an ordinary private litigant (*Guaranty Trust Co. v. U. S.*, 304 U. S. 126, 135; *U. S. v. Belmont*, 85 Fed. (2nd) 542, 544; *U. S. v. National City Bank*, 83 Fed. (2nd) 236, 238; *Ritter v. U. S.*, 28 Fed. (2nd) 265, 267).

No treaty or statute of the United States ever conferred any title on the Soviet Government. Whatever rights that Government could have claimed in our courts, were derived from Soviet legislation and the decisions of the Soviet courts. Either the Government claims under this Soviet title assigned to it by the Roosevelt-Litvinov Agreement, or it has no claim at all.

No doctrine of *uberrima fides* in the interpretation of the treaty imposes a duty upon the court of writing into the treaty provisions which it does not contain. The only legal systems that might have governed the rights of the Soviet Government before the Roosevelt-Litvinov Agreement, was either that of the Soviet Government itself or some other state wherein the property in question was located. In this particular instance, all the assets of the First Russian Insurance Company at all the times, and even now, are still within the State of New York.

POINT VI.

Even if there were a conflict between New York and Soviet law, under the conflicts rule laid down by this Court, the New York law must govern.

There is no conflict between any Federal law and the New York State law. In a futile attempt to create such conflict, the Government was forced to take in its brief (p. 40), the absurd position that the Roosevelt-Litvinov agreement is the supreme law of the country within the meaning of the Federal Constitution.

Concededly, the Roosevelt-Litvinov Agreement is a mere executive compact, not concluded with the advice of and not consented to by two-thirds of the United States Senate. It is not a treaty within the meaning of the constitutional provision providing that "all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land" (U. S. Constitution, Art. VI, Cl. 2). What is meant by "authority of the United States" is explained in another part of the Constitution, where it is provided that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur" (U. S. Constitution, Art. II, Sec. 2, Cl. 2). A mere executive agreement not advised and consented to by two-thirds of the United States Senate is not a treaty nor the supreme

law of the land within the meaning of the Federal Constitution (*U. S. v. Belmont*, 301 U. S. 324, 330; *U. S. v. Curtiss-Wright Corp.*, 299 U. S. 304, 318; *Altman & Co. v. U. S.*, 224 U. S. 583, 600-1; *Watts v. U. S.*, 1 Wash T. 288, 294). Cf. *Sutherland, Constitutional Power and World Affairs*, pp. 120-1, 125, 137-8.

When an international compact made by the United States is not a treaty within the meaning of the Federal Constitution, and is not made for the purpose of effectuating an already existing treaty, advised and consented to by the Senate, then it is not a rule for the courts, unless the Congress by appropriate legislation makes it the law of the land (*Chinese Exclusion Cases*, 130 U. S. 581, 600; *Foster v. Neilson*, 2 Pet. 253, 313; *In re Ah Lung*, 18 Fed. 28, 29; *Turner v. American Baptist Missionary Union*, 5 McLean 344-7, 24 Fed. Cas. No. 14, 251, pp. 344-5; *In re Metzger*, 17 Fed. Cas. No. 9511, 232-4).

The only possible conflict that may arise in the enforcement of the Roosevelt-Litvinov agreement is that between the Soviet law and the New York law. Under the recent decisions of this Court, the Federal Court must apply such rule for the solution of this conflict as is devised by the State Courts. The rule of the State Court is set forth both in the decision in this case (R. 71-2) and in *Moscow Fire Insurance Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286.

In *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, this Court said at pages 496 and 497:

"We are of the opinion that the prohibition declared in *Erie R. Co. v. Tompkins*, 304 U. S. 64, against such independent determinations by the Federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal courts in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb

equal administration of justice in co-ordinate state and federal courts sitting side by side. See *Erie R. Co. v. Tompkins*, supra, pages 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. *Milwaukee County v. M. E. White Co.*, 296 U. S. 268. This court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser v. J. B. Preston Co.*, 290 U. S. 163."

In *Griffin v. McCoach*, 313 U. S. 498, this Court said at page 503:

"For the reasons given in *Klaxon v. Stentor Electric Mfg. Co.*, 313 U. S. 487, this term, decided today, we are of the view that the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the states in which they sit."

Dated: New York, December 1st, 1941.

Respectfully submitted,

BORRIS M. KOMAR,

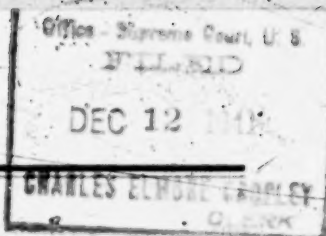
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FILE COPY



IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 42.

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; VICTOR YERMALOFF, and Others.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW YORK, NEW YORK COUNTY.

**BRIEF ON BEHALF OF FREDERICK H. CATTLEY, ET AL.,
BRITISH SHAREHOLDERS IN THE FIRST RUSSIAN
INSURANCE COMPANY, AS AMICI CURIAE.**

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British Shareholders in the First Russian
Insurance Company, as Amici Curiae.*

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LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827; VICTOR YERMALOFF, AND OTHERS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

**BRIEF ON BEHALF OF FREDERICK H. CATTLEY ET AL.,
BRITISH SHAREHOLDERS IN THE FIRST RUSSIAN
INSURANCE COMPANY, AS AMICI CURIAE.**

This brief is submitted on behalf of the British shareholders of the First Russian Insurance Company as *amici curiae* pursuant to agreement of the parties herein executed May 9, 1941, and duly filed. In a prior brief, similarly filed, these shareholders asked that the petition for certiorari herein be dismissed or denied on the grounds: (1) that there was no conflict between the decision below (284 N. Y. 555) and *United States v. Belmont*, 301 U. S. 324; (2) that even if such conflict existed it was necessarily resolved by the subsequent decision in *Moscow Fire Ins. Co. v. Bank of New York & Tr. Co.*, 309 U. S. 624, 697; (3) that the decision below was based upon an independent and adequate non-federal ground, namely the lack of extra-territorial

effect, under local New York law, of the Soviet decrees under which petitioner sued as assignee; (4) that no valid reason did or could exist for a relitigation of the admittedly identical question involved, decided and set at rest by the *Moscow* case, *supra*.

In the alternative the shareholders requested that if certiorari be granted, the judgment below should be affirmed upon the authority of the *Moscow* case (161 Misc. 905; 253 App. Div. 644; 280 N. Y. 286, 848; 308 U. S. 542, 309 U. S. 624, 697).

The contentions advanced in the shareholders' earlier brief consequently will not be restated here but are respectfully urged in support of an affirmance of the judgment.

Summary Statement of the Matter Involved.

Petitioner, by its complaint herein seeks in substance outright confiscation of \$1,335,653.73, representing the surplus assets of the First Russian Insurance Company remaining now in possession of the New York Superintendent of Insurance after payment of all domestic creditors. That complaint has been duly dismissed by all the New York courts (R. 52; 259 App. Div. 871, 284 N. Y. 555) upon the Superintendent's motion for summary judgment, made on affidavits under the New York practice (C. P. R. 113), wherein it was established without dispute that the complaint was predicated upon the *identical* Soviet decrees which had previously been construed in the *Moscow* case to be without extra-territorial effect and not to embrace the assets of a nationalized Russian insurance company deposited in New York with a local trustee in accordance with applicable local law and which were in the process of liquidation under the lawful custody and supervision of the New York Supreme Court. This was plainly all a matter

of local law duly asserted in accordance with permissive local procedure and presented no federal or novel question when raised again herein. Consequently there remained no alternative but to dismiss the complaint since the state courts were bound by their prior decisions as to the scope and effect of these identical decrees which have been exhaustively litigated for six years in the *Moscow* case and by the findings made in that litigation of which they had full judicial knowledge and notice as a part of their own official records.

In seeking certiorari, petitioner asserted the judgment of dismissal by the highest state court, entered on the summary judgment motion, conflicted with *United States v. Belmont*, 301 U. S. 324, which, it was claimed, validated in this country the aforesaid Soviet decrees of confiscation; secondly, that the decision below did not rest upon any independent and adequate non-federal ground.

These shareholders contended, in opposition to certiorari, that the *Belmont* case had previously been distinguished correctly by the New York Court of Appeals in the *Moscow* case (280 N. Y. 286, 308-9) as merely involving the sufficiency of a pleading, the allegations of which had been expressly admitted by demurrer and which "in no wise support the appellant's contention here, where we are considering whether title to property in the custody of this State has been transferred *in invitum* from its owner to the Soviet government or is 'dependent' upon the law of Russia" (*Id.* at pp. 308-9). That decision was duly affirmed by this Court (309 U. S. 624), rehearing was unanimously denied by this Court (309 U. S. 697) and as the state court of last resort has held in the present case (284 N. Y. 555, 556):

"The decision left open no question which has been argued upon this appeal."

Indeed in the present case, the allegations of the moving affidavit on the summary judgment motion that the identical Soviet decrees were involved in both cases were wholly uncontested; this being so, under the state practice, the allegations of the complaint could not be adverted to as proof in opposition to the motion, it was in effect wholly unopposed and there was no alternative but to grant summary judgment dismissing the complaint on the merits (*Gindzo v. Marine Tr. Co. of Buffalo*, 258 App. Div. 298; aff'd. 284 N. Y. 617).

Secondly, these shareholders contended that the state court decision (which admittedly adopted and readhered to the *Moscow* decision) was plainly bottomed upon an independent and adequate non-federal ground, viz. the inapplicability under Russian law of the Soviet decrees to the New York assets in suit. Dismissal or denial of certiorari was accordingly requested—or in the alternative it was asked that certiorari be granted and the judgment affirmed under the authority of the decision in the *Moscow* case.

Petitioner, having secured certiorari, has now departed radically from the limited grounds urged in its petition. Realizing that an adjudication of its alleged title as assignee is not possible upon a record which discloses only an unopposed motion for summary judgment, petitioner now advances the new and startling proposition that the decision of the state court of last resort in the *Moscow* case (which admittedly controlled the decision below in the present case) was, despite its express language, in reality bottomed upon the wholesome public policy of New York which condemns confiscation; that such likewise was our national public policy for fifteen years (in fact since the founding of the union) but that all this was overturned in 1933 by the action of the President in procuring for the United States an assignment of the rights of the U. S. S. R., if any, under

the Soviet confiscatory decrees by virtue of the so-called Litvinoff assignment.

From this extraordinary contention it is then boldly suggested that these surplus funds might conceivably be *res nullius* unless covered into the public treasury under this new and alien doctrine of confiscation; that the Presidential action in accepting the assignment constituted a recognition of this abhorrent doctrine which this Court is powerless to impugn; that consequently the claims of these shareholders who were invited to deposit their funds in this country for legitimate business purposes "would seem to be invalid" and that unless petitioner's right to claim the entire fund be sustained (despite all the aforesaid contrary adjudications) the fund "would in principle go to the State of New York by way of escheat": although no such claim has been or could be asserted in view of our Constitutional guaranties, the settled public policy of state and nation and indeed every usage of civilization.

This in substance is the petitioner's claim. To these British shareholders, our friendly allies in the present struggle of democracy, who have been guaranteed the protection of their property by the Constitution of the United States (*Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489; *Hines v. Davidowitz*, 312 U. S. 52, 65) and who long ago were duly invited by the New York court of last resort to come in and claim their own property¹ (*Matter of People*

¹ The New York Court of Appeals has found that the First Russian Insurance Company has 10,000 shares issued and outstanding (255 N. Y. 415, 426) and that the surplus, after payment of creditors should be disposed of by the surviving directors "in ways that will be just and equitable to all the interests affected" (*id.*). It has held that such surplus in the cases of nationalized Russian insurance companies should pass "to the stockholders and foreign creditors who, in answer to an invitation extended to them by this State, have come in and proven their claims in accordance with a procedure devised by this court to 'conform to justice and equity' as these terms are understood here" (*Moscow Fire Ins. Co. v. Bank of N. Y. & Tr. Co.*, 280 N. Y. 286, 314).

(*First Russian Ins. Co.*), 255 N. Y. 415, 426), it is unthinkable that this Court, to whom is entrusted the protection of all Constitutional liberties, would countenance such claim. We propose to meet it squarely, now that the direct challenge has been thrown down (Petr. main brief, pp. 9-11).

Summary of Argument.

1. The decision below did not deny effect to the Soviet decrees because of a state (or national) policy against confiscation, but because even under Soviet law such decrees were without extra-territorial effect and did not embrace the property in question.

2. The *Belmont* case had nothing to do with this question which involves no question of our foreign relations or national foreign policy.

3. The independent and adequate non-federal ground upon which the decision below rested was that the Soviet decrees did not reach the assets in New York as a matter of foreign law (or fact), not upon the theory that the funds were held in New York by a separate juristic entity, but notwithstanding, the funds did constitute such entity under New York law, the state law on this subject is binding here and presents no reviewable federal question.

4. Confiscation has been and is abhorrent to our state and national public policy and to the laws and usages of civilized nations generally, even as respects the property of enemy aliens. This surplus is the property of friendly alien shareholders and is guaranteed protection by the Fifth and Fourteenth Amendments to the Constitution of the United States.

The decision below was not predicated upon a state policy against confiscation, but had it been, such policy accords with our national policy as respects the private property of friendly allies situated here.

Petitioner contends the decision in the *Moscow* case (which was incorporated as the decision below) "must have been" that New York will not give effect to any transfer of rights "under the Soviet decrees because of their confiscatory character". This is of course demonstrably untrue for New York, subsequent to recognition of Soviet Russia, has expressly accorded due effect to the Soviet confiscatory decrees as applied to property located and contracts made in Russia (*Salimoff v. Standard Oil Co. of N. Y.*, 202 N. Y. 220; *Dougherty v. Equitable Life Assur. Soc.*, 266 N. Y. 71). But it has properly refused to extend such decrees to assets in the lawful custody of New York courts, not because of any public policy—but because, as a matter of fact such decrees do not in fact reach such property (*Moscow Fire Ins. Co. v. Bank of N. Y. & Tr. Co.*, 280 N. Y. 286). The decision in the *Moscow* case was statedly

"Not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy, but because under the law of this state such confiscatory decrees do not affect the property claimed here" (280 N. Y. 286 at p. 314).

This is made abundantly clear when the findings which were made and affirmed concerning these decrees are re-examined. The state trial court found as findings of fact²

² See Record in 309 U. S. 624 at R. 114-15.

that by subsequent Soviet decrees taking effect as of January 1, 1923 "the effect of the nationalization decrees passed prior to 1921, including the decree providing for the nationalization of insurance enterprises, was modified so as to apply only to such private property as was factually in the possession of the Soviet government or organized toilers prior to May 22, 1922;" that pursuant to such Soviet legislation "private property not factually in the possession of or in the inventories of the Soviet government, its agents or representatives, was, pursuant to the decision of the highest Soviet courts, actually returned to its former owners."

Here it is undisputed that the property in question has never been factually in possession of the Soviet authorities or in their inventories at all. On the contrary it remained as a separate juristic entity in New York conducting an active insurance business there in conformity to New York law from 1918 to 1925 when liquidation of such entity under state law was begun by the New York Superintendent of Insurance who has since been in lawful possession as liquidator. The state court found it is the law of Soviet Russia "that the ownership of property is to be determined by the law of the place where the property is located" (i. e., the law of the State of New York); that the confiscatory decree of November 28, 1918 "did not purport or intend to vest the Soviet State with title to any assets outside of Russia of nationalized Russian Insurance Companies"; that the Soviet government *never* claimed extraterritorial effect for any of its nationalization decrees (excepting those relating to the Russian Merchant Marine) and that an oral expert opinion to the contrary was "without support in

the evidence and is contrary to the documentary evidence herein."³

Petitioner seeks to escape all this by stating in its brief (p. 9) that "although . . . the complaint prays that all assets remaining in the hands of respondent after the payment of domestic creditors be turned over to the United States, the only relief presently sought is that the United States be recognized as the successor to the title and interest of the First Russian Insurance Company." But petitioner admits (p. 10, n. 2) the rights of foreign creditors have been annulled by the state court decisions in *Dougherty v. Equitable Life Assurance Co.*, 266 N. Y. 71 (Cf. also *Dougherty v. Nat. City Bank*, 167 Misc. 849; *Tillman v. Nat. City Bank*, 118 F. (2d) 631 cert. den. 314 U. S. . . . , No. 293 Oct. term 1941) so this is merely a circuitous means of asserting the claim that the residuary property interest of friendly allied shareholders which has its situs here and which enjoys our Constitutional guaranty against confiscation may be wholly destroyed. Certainly in the absence of confiscation petitioner is not the successor to the claims of these shareholders to whom these surplus funds belong under the doctrine of the *Moscow* case *supra* (280 N. Y. 286, 309 U. S. 624, 697) which has since been followed in *Moscow Fire Ins. Co. v. Heckscher & Gottlieb*, 260 App. Div. 646, 285 N. Y. mem. 162 and by the state courts below (284 N. Y. 555) years after the decision in the *Dougherty* case *supra*. These shareholders were not impleaded in this action, consequently no decision recognizing the petitioner as the successor to their title and interest could be sus-

³ Under the state law which controls on all non-federal questions, the oral opinions of experts on Russian law may be wholly disregarded when, as here, contrary to the plain text of the applicable Russian laws, decrees and decisions (*Cardozo, C. J. in Petrogradsky M. K. Bank v. National City Bank*, 253 N. Y. 23, 34; *Dougherty v. Equitable Life Assur. Soc.*, 266 N. Y. 71; *Moscow Fire Ins. Co. v. Bank of N. Y. & Tr. Co.*, 280 N. Y. 286, 306).

tained except upon the basis of a naked confiscation of their property, however artfully this end may be camouflaged.

Petitioner then contends (pp. 78-84) that the scope of the Soviet decrees and their lack of extra-territorial effect is still open because only questions of law were decided by the state court below (284 N. Y. 555); that this issue was not raised on the summary judgment motion and that the scope of the Soviet decrees raises alleged "issues of fact" which could not have been lawfully determined⁴ on a motion for summary judgment. Petitioner then curiously argues that the state courts should have blinded themselves to their own official records⁵ in the *Moscow* case (despite the fact that C. P. R. 113 expressly permits the case of such official record on a summary judgment motion) and that similarly this Court must blind itself to what its own official docket reveals in the *Moscow* case as to the scope of such decrees and again redetermine what has heretofore been set at rest by affirmance of the *Moscow* decision, although elsewhere petitioner argues (by reference to the *briefs* in the *Moscow* case) that this Court has power to determine the scope of such Soviet decrees independently of the state court's decision below and to reach a contrary conclusion on matters that are said to be purely factual.

All this presents no new federal question—whether the summary judgment motion was proper in form and correctly granted on the record made was and is a matter of local law only on which the two state courts of appeal have expressed their unanimous concurrence with the state Supreme Court decision (R. 52; 259 App. Div. 871; 284 N. Y.

⁴ But the very purpose of summary judgment is to determine in advance of trial if there is a genuine fact issue. Here the state courts have determined there is none.

⁵ Cf. Rules 1001-6 of the proposed Code of Evidence of the American Law Institute (27 A. B. A. Journal 744-5, December, 1941).

555). No rehearing or certificate was asked for in the state court of last resort; no mention of any claim that the procedure adopted below violated the state practice on a motion for summary judgment consequently was or could be asserted as a federal question in the petition for certiorari.

The truth of the matter is that the summary judgment motion was in reality wholly uncontested in the state court; respondent moved on affidavit setting up that the Soviet decrees relied on in the complaint were identical with those construed in the *Moscow* case; this was expressly admitted in petitioner's only opposing affidavit which asked only that the motion be stayed pending final decision in the *Moscow* case, and consequently the bare unsupported conclusions in the complaint as to the effect of these decrees could not be adverted to as proof in order to oppose the motion (*Gnozzo v. Marine Tr. Co.*, 258 App. Div. 298, aff'd 284 N. Y. 617). Since the motion was in effect unopposed and in view of petitioner's admissions (then and now) of the identity of the Soviet decrees and their construction in this case and the *Moscow* case, the state courts here plainly had no choice but to follow the *Moscow* decision under the doctrine of *stare decisis*. There was no question as petitioner contends of a "mass of (conflicting) testimony" in the *Moscow* case as the "official record" which was relied upon on the summary judgment motion for, as abundantly appears from the *Moscow* decision, *supra*, it was based upon the unimpeachable documentary evidence of other Soviet decrees issued in 1921 and thereafter reenacted in substance in the Soviet Civil Code of 1922 (effective January 1, 1923) which modified the brutal policy of the prior nationalization decrees and expressly limited their scope "only to such private property as was factually in the possession of the

Soviet Government or organized toilers prior to May 22, 1922"; in other words, where actual physical confiscation had not been factually accomplished prior to 1922 it was by the official published decrees and laws of Soviet Russia thereafter invalidated. Pursuant to these decrees of modification, private property was thereafter *actually returned to its owners* by the Soviet Government officials. The Soviet decrees of October 27, and December 10, 1921 which expressly prohibited such further confiscation of private property not theretofore physically seized, both the Peoples Commissar of Justice and the Supreme Court of the R. S. F. S. R., the highest court in all Soviet Russia, had held in subsequently published decisions, established that such properties "are recognized factually not nationalized and are deemed 'belonging to their former possessors' (that is, former owners)" (309 U. S. 624, Record, pp. 1961-1963). Indeed, as to property in the United States, the Soviet Commissariat of Justice had ruled the general annulment of life insurance agreements "does not extend to the territories located without the borders of the U. S. S. R. and particularly to the United States of North America." (309 U. S. 624, Record, at p. 856).

All the oral expert testimony possible could not overcome these published Soviet counter decrees ending the confiscatory policy of nationalization as to property not yet physically seized; the conceded fact of the subsequent restoration of private property by Soviet officials and the published decisions of the highest Soviet legal authorities construing these counter decrees of 1921 (which became a part of the Soviet Civil Code in 1922) in accordance with their plain language as ending the confiscatory policy promulgated as a military measure in the early days when the new revolutionary Russian government was

seeking to establish itself in power. Consequently, the New York state court of last resort properly concluded, in accordance with governing principles of applicable state law, to reject and discard the contrary oral opinions of interested experts, to examine for itself the context of these Soviet decrees, laws and decisions and to conclude, as had the highest Soviet courts, that they meant exactly what they said and that they amply supported the state court findings which determined (1) the nationalization decrees in question had no extra-territorial effect as applied to property in the United States of North America, and (2) that they had been effectively repealed by 1923 as to unseized property by the subsequent 1921 decrees and the 1922 Civil Code (*Moscow Fire Ins. Co. v. Bank of N. Y. & Tr. Co.*, 280 N. Y. 286, at 306; *Petrogradsky M. K. Bank v. National City Bank*, 253 N. Y. 23, 34). In the *Petrogradsky Bank* case, Mr. Justice Cardozo said:

"The mere opinion of a witness will not control the judgment of a judge in regard to foreign law except to the extent that it is a reasonable inference from statute or from precedent or from the implications of a legal concept, such as a contract or testament or juristic personality (*Eastern Bldg. & Loan Assn. v. Williamson*, 189 U. S. 122, 127; *Finney v. Gay*, 189 U. S. 335, 342; *Bank of China, etc. v. Morse*, 168 N. Y. 458, 470; *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127, 138, 139). Unless it is this, the judge must use his own judgment and find the meaning of the foreign law as he would if the meaning to be ascertained were that of a deed or an agreement. *This is as true upon appeal as it is upon a trial.*"

There was therefore before the state court in granting summary judgment: (1) petitioner's express admissions that the 1918 Soviet decrees specified in the complaint were

the identical decrees adjudicated in the *Moscow* case; (2) the admission that the *Moscow* decision was controlling here; (3) the official records of the Soviet counter decrees of 1921, the Soviet Civil Code and the decisions of the highest Soviet tribunals all holding that nationalization of private property had ceased by 1923 as to such property not then in factual possession of the Soviet authorities; (4) the official record of the *Moscow* case wherein the state court had made findings to this effect based upon this documentary record of the foreign law, its authoritative interpretation and undisputed application; (5) the fact of final affirmance of the decision in the *Moscow* case. There was no alternative but to grant summary judgment under applicable state law and the affirmance of such judgment by the state court of last resort on this matter of state law (no new matter differing from the *Moscow* decision having been presented to it) presented no federal question for review by this Court.

What petitioner now seeks is in reality a rehearing and a reversal by this Court of the *Moscow* decision. But it made one such attempt nearly two years ago and lost by a unanimous decision (309 U. S. 697). One trial of an issue is enough (*Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 78).

In the light of the foregoing, petitioner is reduced to the claim that the Lityinoff assignment necessarily must have passed title to these shareholders' private property in New York since the President in accepting it necessarily made an executive determination, not reexaminable here, that it was in the interests of the United States (pp. 28-45). This argument is fallacious on its face, for the petitioner at most acquired only the rights of a common law assignee subject to all the defenses available under the local law wherever it asserted its rights (*United States v.*

Buford, 28 U. S. 12, 30; *Guaranty Trust Co. v. United States*, 304 U. S. 126); the assignment concededly was only an incidental part of a general scheme for the recognition of Russia; it did not even reach the dignity of a treaty requiring ratification by the Senate, but if it had, Soviet Russia warranted nothing thereby and if Russia had in fact no title under Soviet law it of course could assign nothing here.

Lastly, this fund is the private property of friendly alien shareholders who are not citizens of Russia. It is not an amount "admitted to be due or that may be found due" Soviet Russia from American nationals, including corporations, companies, partnerships or associations, nor is it a debt due the Soviet regime as successor of prior Governments of Russia or otherwise. This was all that Litvinoff purported to assign on November 16, 1933 and it was all consequently that petitioner could receive under such assignment; the question of whether the assignment was or is beneficial to petitioner in other respects is of no relevancy here. Certainly it could not operate to confiscate and transfer the private property of friendly allies in the absence of a concurrent repeal of the due process clause of the Constitution of the United States.

II.

***United States v. Belmont* does not govern.**

We will not repeat again the elementary proposition that a decision on demurrer wherein all the allegations of a complaint are accepted as true for the purposes of the demurrer has no relevancy to a decision on a motion for summary judgment where the moving affidavit is wholly unopposed and under the state practice, which controls, the

complaint cannot even be adverted to in opposition. The *Belmont* case under these circumstances obviously cannot be "conclusive" of any issue here for all it held was that the Litvinoff assignment (for whatever it may be worth), is not open to judicial review and that a cause of action thereunder, based upon the Soviet decrees, was cognizable here on its face, even though it might develop subsequently that the decrees and assignment conveyed absolutely nothing to the assignee. Here it appears beyond possible question from the official records of Soviet Russia, the New York Courts and this Court, as established by the subsequently decided *Moscow* case, that the allegations of the complaint are not in fact true and that the Soviet decrees relied upon do not under Russian law embrace the assets in question. Had the present case come up therefore even on mere demurrer to the complaint (and not on a motion for summary judgment made in lieu of a burdensome trial on this identical issue) it is of course to be assumed that this Court and the state courts would have taken judicial notice of their own records and of the prior decision in the *Moscow* case and sustained such demurrer in view of the now established insufficiency of any such complaint. Prior to the *Moscow* decision, however, there was no official determination here of the scope and effect of the Soviet decrees, consequently it was assumed for purposes of pleading in the *Belmont* case that a cause of action thereon was good; now it is authoritatively established that it is not—at least to the surplus assets here belonging to the friendly shareholders of nationalized Russian insurance companies.

III.

The state court's decisions were not predicated upon the theory of a separate juristic entity in New York but upon the lack of extra-territorial effect of the Soviet decrees; nevertheless such separate juristic entity was in fact established under the local law and no reviewable federal question is presented thereby.

Petitioner has seized upon the portion of the opinion of the state court of last resort in the *Moscow* case which upholds the view that the New York branches of these Russian insurance companies (Moscow Fire Insurance Company and First Russian Insurance Company) were separate juristic entities (or, as petitioner styles the branch of the First Russian company, "the domesticated United States branch", whatever that may mean). The undisputed fact is, of course, that many years ago each company deposited with a New York trustee in accordance with the New York Insurance Law, a separate reserve fund to cover all the domestic policies written by the New York branch which had its own local office functioning independently under a local manager; that such branches were thereafter run under the direct supervision of the New York Superintendent of Insurance pursuant to the New York laws; that they continued to function as completely independent juristic entities for nearly seven years (1918-1925), after nationalization and confiscation in Russia in 1918, conducting an insurance business in New York down to August 8, 1925, when each was placed in a local liquidation under the local New York law by the respondent Superintendent of Insurance (255 N. Y. 415); that the residue of the surplus deposit, after payment of valid creditor claims as determined in liquidation proceedings, belongs to the corporate shareholders, whose property it is; and that such surplus in the *Moscow* case has already been distributed to the shareholders through the medium of the

sole surviving director and that the New York Court of Appeals has long ago prescribed a like procedure for the First Russian shareholders through the medium of its own surviving directors (255 N. Y. 415, 426).

All this is in accord with the prevailing New York law that such local branches constitute separate juristic personalities or entities wholly independent of and unaffected by the vicissitudes of the offices in Russia and which "must be treated as a domestic insurance company and as domiciled in this state" (*Morgan v. Mut. Benefit Life Ins. Co.*, 189 N. Y. 447, 454; *Comey v. United Surety Co.*, 217 N. Y. 268, 273-4; *Matter of People (City Eq. Fire Ins. Co.)*, 238 N. Y. 147; *James v. Russia Ins. Co.*, 247 N. Y. 262, 265).⁶ This was the view adopted in the *Moscow* case which was affirmed by this Court and unanimously readopted by the New York Court of Appeals in its opinion below (284 N. Y. 555). Petitioner now disagrees with this view and cites voluminous earlier local authorities in an endeavor to show that the dissenting opinion in the *Moscow* case was right and the majority wrong; however, since then the New York Court of Appeals has herein *unanimously* adopted the majority opinion in the *Moscow* case as dispositive of this issue (284 N. Y. 555); to the extent, therefore (if any), that the decision in the *Moscow* case went upon the theory of a separate juristic personality or entity in New York, it represents the authoritative and final pronouncement of the state court of last resort upon a matter purely of local law (involving a construction of New York statutes and New York decisions and which presents no reviewable federal question) in a local field wherein the New York Court of Appeals is the supreme authority and in which this Court will not intrude with contrary views (*Erie R. Co. v. Tompkins*, 304 U. S. 64).

⁶ See also *Matter of People (Norske Elloyd Ins. Co.)*, 242 N. Y. 148, 158; *Moscow Fire Ins. Co. v. Bank of N. Y. & Tr. Co.*, 280 N. Y. 286, 309-10.

IV.

If, as petitioner contends, a new public policy of confiscation of private property is sought herein it cannot be sustained under whatever guise or pretext it may be attempted.

As was said in *Hines v. Davidowitz*, 312 U. S. 52, 65, n. 14:

"Every state is by the law of Nations compelled to grant aliens at least equality before the law with its citizens, as far as safety of person and property is concerned. An alien must in particular not be wronged in person or property by the officials and courts of a state. 1 Oppenheim: International Law (5th ed. 1937) pp. 547-548. And see 4 Moore: International Law Digest, pp. 2, 27, 28."

"Confiscation is a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times" (*Hanger v. Abbott*, 6 Wall. 532, 536). "So degrading an idea will be rejected with disdain by every man who feels a true and well-informed national pride" (7 Hamilton's Works, p. 329) and the exercise of the right is contrary to the practice of civilized nations (Dana: Wheaton on International Law, p. 392). We do not confiscate the goods of the stranger within our gates, even though he be an alien enemy (Cardozo, C. J., in *Techt v. Hughes*, 229 N. Y. 222, citing 2 Oppenheim, *supra*, p. 139; Phillimore's Commentaries on International Law (5th ed.) p. 417; Hall: International Law (6th ed.) p. 451; 2 Hyde: International Law, pp. 229, 238. See also Hague Convention of 1907, Art. 23 (h)). Indeed "that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated" (*United States v. Percheman*, 32 U. S. 51, 86-7; *Ware v. Hylton*, 3 Dall. 199, 281; *Brown v. United States*, 8 Cranch 110; 2 Westlake: International Law 46, 47).

It is not the law of England, the domicile of these shareholders, to confiscate the private property, even of enemy aliens (*Stevenson v. Aktiengesellschaft etc. A. G.* (1918 H. L.) 239 244) nor is such doctrine recognized here (*Cummings v. Deutsche Bank*, 300 U. S. 115). This however is not the property of enemy nationals safeguarded only by custom among civilized nations and the usages of international law, it is the property of our friendly allies and as such it is within the protection of the Constitution of the United States (*Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489; *Hines v. Davidowitz*, 312 U. S. 52, 65, n. 14).

Nor may the undisputed powers of the President in the field of international relations be availed of as a cloak or pretext for the evasion of a fundamental constitutional guaranty. It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of exerting powers which have been granted to the United States (*McCullough v. Maryland*, 4 Wheat. 316, 423; *Linder v. United States*, 268 U. S. 5, 17). "To an end not within the terms of the Constitution, all ways are closed" (*Carter v. Carter Coal Co.*, 298 U. S. 238, 291). Even the war power is subject to applicable constitutional limitations (*Ex parte Milligan*, 4 Wall. 2, 121-127; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 326; *United States v. Joint Traffic Assn.*, 171 U. S. 507, 571; *McCray v. United States*, 195 U. S. 27, 61; *United States v. Cress*, 243 U. S. 316, 326; *Hamilton v. Kentucky Distilleries*, 251 U. S. 146, 156; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88).

Petitioner concedes that local defenses to the merits of claims allegedly covered by the Litvinoff assignment are not barred thereby (brief, pp. 24-5; *Guaranty Tr. Co. v. United States*, 304 U. S. 126). If this be so, nothing can be

found in either the assignment or the President's actions surrounding its acceptance from which a destruction of the vested property rights of friendly aliens and the safeguards afforded them by our Constitution can be even remotely implied.⁷ "It is to be assumed that the United States is incapable of bad faith" (*Great Falls Mfg. Co. v. Garland Atty. General*, 124 U. S. 581, 599).

The assignment is not a treaty made by the President by and with the advice and consent of the Senate (Const. Art. II Sec. 2 Cl. 2) but a mere executive agreement only and not the supreme law of the land (*United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 318; *Altr in & Co. v. United States*, 224 U. S. 583, 600-1). But even if it attained the dignity of a treaty, no treaty can authorize that which the Constitution forbids (*Asakura v. Seattle*, 265 U. S. 332, 341; *Thomas v. Gay*, 169 U. S. 264, 271; *Geofroy v. Riggs*, 133 U. S. 258, 267; *The Cherokee Tobacco*, 11 Wall. 616, 620-1; *Doe v. Braden*, 16 How. 635, 657).

Conclusion.

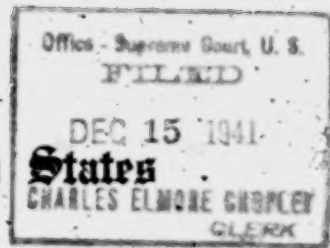
It is respectfully submitted that the decision below should be affirmed.

December 12, 1941.

ALBERT G. AVERY,
Attorney for Frederick H. Cattley, et al.,
British shareholders in the First Russian
Insurance Company, as Amici Curiae.

⁷ See *United States v. Belmont*, 301 U. S. 324, 336-7; *Toduk v. Union State Bank*, 281 U. S. 449; *Guaranty Trust Co. v. United States*, 304 U. S. 126, 143.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1941

No. 42

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the
State of New York, and as Liquidator of the Domesti-
cated United States Branch of First Russian Insurance
Company Established in 1827; VICTOR YERMA-
LOFF, and others.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK, NEW YORK COUNTY.

AMICUS CURIAE BRIEF ON BEHALF OF CERTAIN
RECEIVERS UNDER SECTION 977-b OF THE NEW YORK
CIVIL PRACTICE ACT

FREDERICK H. WOOD,
ALBERT RAY CONNELLY,
Of Counsel.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1941

UNITED STATES OF AMERICA,
Petitioner,
v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of First Russian Insurance Company Established in 1827; VICTOR YERMALOFF, and others.

No. 42

BRIEF ON BEHALF OF

IRWIN STEINGUT and HAROLD E. BLODGETT, as Receivers of the assets in New York of Russo-Asiatic Bank;

JOHN R. CREWS, as Receiver of the assets in New York of Petrograd Metal Works;

ELMER F. QUINN, as Receiver of the assets in New York of Vladikavkazsky Railway Company;

JOHN H. THOMPSON, as Receiver of the assets in New York of Petrograd Trading Bank;

THOMAS I. SHERIDAN and JULIUS SCHOR, as Receivers of the assets in New York of Volga Kama Commercial Bank; and

HARRY BIJUR, as Receiver of the assets in New York of Northern Insurance Company of Moscow,

As Amici Curiae.

CONSENT OF PARTIES

This brief is submitted upon the written consent of the parties to this appeal, filed with the Clerk of this Court. The Receivers in whose behalf the brief is filed have been appointed by court orders pursuant to Section 977-b of the Civil Practice Act of New York and are parties to pending actions which involve the questions discussed herein.

OPINIONS BELOW

The memorandum opinion of the Supreme Court of the State of New York, New York County, is not reported. The judgment based thereon was unanimously affirmed without opinion by the Appellate Division of the Supreme Court for the First Judicial Department (259 App. Div. 871). The *per curiam* opinion of the New York Court of Appeals, affirming the judgment below, is reported in 284 N. Y. 555.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1935 [28 U. S. C. §344(b)].

SUMMARY OF ARGUMENT

The decision of the New York Court of Appeals does not present a federal question subject to review by this Court.

1. The New York court has held that the Soviet decrees relied upon by petitioner did not purport to confiscate assets in New York of the United States branch of a Russian insurance company and do not affect the disposition of such assets.

2. Neither the interpretation of foreign law by the New York court nor its decision as to the application of such foreign law raises a federal question.

ARGUMENT

THE DECISION OF THE NEW YORK COURT OF APPEALS DOES NOT PRESENT A FEDERAL QUESTION SUBJECT TO REVIEW BY THIS COURT.

1. The New York court has held that the Soviet decrees did not purport to confiscate assets in New York and do not affect the disposition of such assets.

The courts of the State of New York have held that the Soviet decrees relied upon by petitioner did not purport to confiscate assets in New York of the United States branch of a Russian insurance company and do not affect the disposition of such assets. The courts below have so held in this case and, in so doing, have followed the decision in *Moscow Fire Ins. Co. v. Bank of New York*, 280 N. Y. 286, aff'd without opinion, 309 U. S. 624, rehearing denied, 309 U. S. 697.

The *per curiam* opinion of the Court of Appeals in this case expressly states that the court applied the same rules of law which were applied in its decision in the *Moscow* case. The facts considered in the *Moscow* case are substantially the same as the facts herein. In the *Moscow* case, the United States Government, intervenor, appealed to the Court of Appeals from a judgment, rendered after a trial of the issues, dismissing on the merits its petition asserting title to surplus funds in New York of the Moscow Fire Insurance Company. The claim of the United States, as the assignee of the Soviet government under the Litvinov assignment, was based upon the Soviet decrees nationalizing Russian insurance companies and confiscating their assets.

The Court of Appeals held in the *Moscow* case (1) as a matter of construction, that the Soviet confiscatory decrees did not purport to apply to assets in New York of the United States branch of a Russian insurance corporation; (2) as a matter of conflict of laws, that rights to property in New York belonging to the United States branch of a Russian insurance corporation are dependent, not upon the law of Russia, but upon the law of New York; and (3) that under the law of New York, upon the termination in Russia of the corporate existence of the Russian insurance corporation, its residual rights to property located in New York passed to its stockholders and creditors and not to the Soviet government.

In arriving at that decision, the Court of Appeals (per Lehman, J.) thus analyzed the problems involved (pp. 302-303):

"The rights of the United States are derived solely from the assignment by the Soviet government of its claims against nationals of the United States. The claims of the Soviet government for the moneys or property in this country, of Moscow Fire Insurance Company are based solely on its decrees of nationalization of insurance companies and of seizure of their assets. The United States asserts here title to property of a branch in this State of a Russian insurance corporation which it is said was transferred, by force of these decrees, from the insurance corporation to the Russian government. Two questions arise: *first*, whether the Russian decrees were intended to have such effect, and, *second*, whether even if so intended the courts of this State will give them their intended effect.

* * * * *

"The question then of the construction of the Soviet decrees is a question of the law of Russia to be

determined, like other questions of foreign law, upon the testimony of expert witnesses, decisions of the foreign courts or officers authorized to promulgate or authoritatively construe the foreign law, and upon the relevant documents. The question of the effect to be given to the foreign law within this State by the courts of this State must be determined in accordance with the law of this State. * * *

With respect to the construction of the Soviet decrees, the court reviewed the findings of the referee that "the decrees were not intended to apply to the property in this State of the United States branch of Moscow Fire Insurance Company" and held that, notwithstanding the testimony of an expert witness to the contrary, "the findings of the referee are fully sustained by the evidence" (p. 306).

The court then considered whether, even if the Soviet decrees were intended to apply to property with situs in New York, the courts of New York should give such decrees their intended effect and concluded that rights to property in New York belonging to the United States branch of a Russian insurance company are dependent, not upon the law of Russia as formulated in the Soviet decrees, but upon the law of New York. On this point the court said (pp. 307-310):

"Certainly no decree monopolizing the business of insurance in Russia; taking over the conduct of the insurance business formerly conducted in Russia by insurance corporations, and terminating the obligations of such companies could possibly have been intended to apply to business conducted here, or if so intended, could be binding here. * * *

* * * * *

"The findings or conclusions of the courts below that the decrees of nationalization of insurance were not intended to have effect here and that title to and right to possession of the capital of the United States branch of the insurance company is dependent upon the law of this State, rest upon a firm foundation."

The court then examined the law of New York to determine who, under that law, was entitled to share in the distribution of the assets of the United States branch of the Moscow Fire Insurance Company and concluded that, in the situation here presented, the residual rights of the nationalized Russian corporation passed to its stockholders and creditors, and not to the Soviet government. The court said (p. 314):

"The courts, giving effect as they must to the extinction of the parent company, must determine whether the parent company's residual right to property here passes by confiscatory decree to the sovereign who extinguished the parent corporation or whether under the law of this State such rights have passed to the stockholders and foreign creditors who, in answer to an invitation extended to them by this State, have come in and proven their claims in accordance with a procedure devised by this court to 'conform to justice and equity' as those terms are understood here. The courts below have made the proper choice, not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy, but because under the law of this State such confiscatory decrees do not affect the property claimed here."

The decision in the instant case rests upon the identical grounds on which the decision in the *Moscow* case was based. In this case, precisely the same questions were presented.

Paragraph 8 of the complaint alleges that the Soviet decrees nationalized the assets "if every kind and wheresoever situated of all Russian insurance companies" (R. 23). The answer denied each and every allegation of paragraph 8 of the complaint, except the issuance of the decrees (R. 38). In addition, the separate defense was pleaded that the confiscation was operative only within Russia, and that the Soviet government itself has recognized that the nationalization and confiscatory decrees were intended only to confiscate property within the territorial limits of Russia and not to extend to property outside of such territorial limits (R. 46-47). Paragraph 10 of the complaint alleges that, as a result of the Soviet decrees, the assets in New York of the insurance company become the property of the Soviet government (R. 24). The answer denied such allegations (R. 37).

In the affidavit submitted by respondent in support of its motion for summary judgment dismissing the complaint, it is stated that "the facts in the *Moscow* and the instant cases are parallel" and that the "Soviet decrees involved are also the same" (R. 15). Such statements were not controverted in petitioner's opposing affidavit, which asserted merely that in view of the then pending application to this Court for certiorari to review the decision of the New York Court of Appeals in the *Moscow* case, the dismissal of the complaint in the instant case was premature (R. 50-51).

The Court at Special Term granted the motion for summary judgment solely on the authority of the *Moscow* case (R. 52), and in affirming the judgment below, the Court of Appeals relied exclusively upon the *Moscow* decision (R. 71).

As was pointed out in the *Moscow* decision, the Soviet government has itself recognized in various promulgations that the confiscatory decrees here in question purported to confiscate only the property physically located within the territorial limits of Russia, and did not purport to confiscate property located outside of such territorial limits. In its answer filed in this case, respondent has specifically cited several of such promulgations, including Decision No. 124 of October 16, 1924, by the Third Department of the People's Commissariat of Justice, interpreting the decree of November 18, 1919, on the annulment of life insurance contracts. It was held in that Decision that "the general annulment of agreements of life insurance does not extend to the territories located without the borders of the U. S. S. R., and particularly to the United States of North America" (R. 47).

The other promulgations of the Soviet government specifically mentioned in the respondent's answer herein are Circular No. 42, dated April 12, 1922, of the People's Commissariat for Foreign Affairs; Circular No. 194, dated September 26, 1923, of the People's Commissariat of Justice; and Circular No. 329, dated October 23, 1925, of the People's Commissariat for Foreign Affairs (R. 47).

Circular No. 42 states that:

"The Law on Property established by the decrees of the Russian Soviet Government does, therefore, determine only legal relations pertaining to property rights as arise on the territory of the R. S. F. S. R. Legal relations pertaining to property rights whereof the subject matter is situated outside the territory of the R. S. F. S. R. and is not connected with such territory cannot be governed outside the territory of the R. S. F. S. R. by Russian Law and are—irrespective of the nationality of the persons entitled to such rights, be they even Russian citizens—subject to the effects of Local Law."

Circular No. 194 states that:

"Proprietary rights of citizens of the R. S. F. S. R. enforceable outside the R. S. F. S. R. are governed by the laws of the country where they are to be enforced."

There is no decision of this Court or of the New York courts holding, after a trial of the issue, that the Soviet decrees did purport to confiscate such property located in New York. In *United States v. Belmont*, 301 U. S. 324, the question before the Court was whether or not the District Court had erred in granting a motion to dismiss the complaint for failure to state a cause of action. For the purposes of that decision on the pleadings, it was admitted that, as alleged in the complaint (301 U. S. at p. 326), the Soviet decrees had nationalized the assets, wherever located, of Russian nationals, including the relevant bank deposit.

Similarly, in *United States v. Manhattan Co.*, 276 N. Y. 396, the complaint also alleged (276 N. Y. at p. 399) that the Soviet decrees had nationalized the assets; wherever located, of Russian nationals, including the assets in New York there in question, and on a motion to dismiss the complaint for insufficiency the Court of Appeals said that (p. 399) "every fact set forth in the complaint must be deemed to be true". Thus, in neither the *Belmont* case nor the *Manhattan* case was there a finding based upon evidence that Soviet decrees did purport to confiscate assets in New York of Russian nationals.

With respect to the holding herein that, in any event, rights to property in New York belonging to the United States branch of a Russian insurance corporation are dependent, not upon the law of Russia, but upon the law of New York, it has long been settled that such rights are necessarily to be determined with reference to the laws of the state in which the property is located, and that rights in such property predicated upon foreign law will not be recognized or enforced where the effect of enforcement

would be to exclude creditors or would be otherwise contrary to the public policy of the state.

As was pointed out by Mr. Justice (now Chief Justice) Stone in his concurring opinion in *United States v. Belmont*, 301 U. S. 324, 334, 335, this Court has often recognized that a state may refuse to give effect to a transfer, made elsewhere, of property which is within its own territorial limits, if the transfer is in conflict with its public policy, or where the subject of the transfer is a chose in action due from a debtor within the state to a foreign creditor, and, further, that:

“* * * it is a recognized rule that a state may rightly refuse to give effect to external transfers of property within its borders so far as they would operate to exclude creditors suing in its courts. *Harrison v. Sterry*, *supra* [5 Cranch. 289]; *Security Trust Co. v. Dodd, Mead & Co.*, *supra* [173 U. S. 624]; *Disconto Gesellschaft v. Umbreit*, *supra* [208 U. S. 570]; *Clark v. Williard*, *supra* [294 U. S. 211]; *Barth v. Backus*, *supra* [140 N. Y. 230].”

Barth v. Backus, 140 N. Y. 230, one of the cases cited in the foregoing quotation, stated the policy of the State of New York on this point at an early date. It was held in that case that title to property in New York which was acquired by an involuntary assignment under the laws of another state would not be recognized by the New York courts when asserted against the rights of creditors pursuing a remedy against the property in New York, even if such creditors are not residents of New York but are residents of the state wherein the involuntary assignment was made.

Also, in the recent case of *Griffin v. McCoach*, 313 U. S. 498, 506, 507, this Court (per Mr. Justice Reed) has said, in discussing a situation involving the full faith and credit clause:

"Rights acquired by contract outside a state are enforced within a state, certainly where its own citizens are concerned; but that principle excepts claimed rights so contrary to the law of the forum as to subvert the forum's view of public policy. Cf. *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 110; 120 N. E. 198. It is 'rudimentary' that a state 'will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or in other words, violate the public policy of the State where the enforcement of the foreign contract is sought.' *Bond v. Hume*, 243 U. S. 15, 21. * * *

* * * * *

"* * * It is for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement."

The conclusion of the court in the instant case that under New York law no rights in the New York assets passed to the Soviet government by virtue of the confiscatory decrees is supported not only by the consideration mentioned in the *Moscow* case, but also by legislative expression of the policy of the State of New York. By Section 977-b of the Civil Practice Act*, the New York Legislature

*Section 977-b was construed and held to be constitutional in *Oliner v. American-Oriental Banking Corporation*, 252 App. Div. 212, aff'd without opinion, 277 N. Y. 590.

has set up a comprehensive scheme for the liquidation of assets in New York of corporations which have been nationalized in their domiciliary country or countries. Provision is made in Section 977-b for the appointment of a receiver of such assets, for the investigation of claims, for the payment of creditors, and for the disposal of the surplus to stockholders or others who may be entitled thereto. Subdivision 19 of Section 977-b provides, *inter alia*, that

“* * * such * * * nationalization, * * * in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property * * * of such corporation within the state * * *.”

It is therefore submitted that the decision of the instant case is clearly correct and, if jurisdiction of the cause should be assumed by this Court, the judgment of the state court should be affirmed. It is also submitted, however, that the decision of the New York court does not present a federal question subject to review by this Court.

2. No federal question is presented by the decision of the New York court.

Petitioner invokes the jurisdiction of this Court under Section 237(b) of the Judicial Code, as amended [28 U. S. C. § 344(b)], which provides that:

“It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in

which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; * * *."

It is undisputed that in this case no question has been raised concerning the validity of any statute of the United States or of the State of New York. And we are not concerned with the question whether the Litvinov assignment is a treaty within the meaning of Section 237(b) of the Judicial Code, because under the Litvinov assignment the Soviet government assigned to the United States government only " * * * the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, * * *" (R. 36a, 36c). By the terms of that assignment, the United States government received only the amounts admittedly due, or thereafter found to be due, the Soviet government, and this Court has held that by virtue of that assignment the United States government received only the rights possessed by the Soviet government at the time of the assignment. *United States v. Belmont*, 301 U. S. 324, 335-37; *Guaranty Trust Co. v. United States*, 304 U. S. 126, 141.

As the New York Court of Appeals stated in the *Moscow* case (280 N. Y. 286, 304):

"There is nothing * * * to suggest that the United States was to acquire or exert any greater rights

than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States * * * is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them.' (*Guaranty Trust Co. v. United States*, 304 U. S. 126, 143.) The United States has not invoked the judicial authority of the States in aid of an agreement it has consummated, calculated to give the decrees of the Soviet government force beyond the force given to decrees of other recognized governments. It invokes the aid of the court only to enforce rights of the Soviet government, whatever they might be, which the United States has acquired by assignment, to property within this State and subject to the law of the State."

In determining the claims of the Soviet government which are here asserted by the United States, the New York court has decided (a) that such claims were dependent upon New York law and (b) that under New York law, such claims were invalid.

On the latter point it is, of course, not open to question that no federal question is presented, for the decision of the highest court of a state is conclusive as to the law of that state. *Frie Railroad Co. v. Tompkins*, 304 U. S. 64; *Neblett v. Carpenter*, 305 U. S. 297, 302.

The only possibility of a federal question must, therefore, lie in the decision that the claims of the Soviet government to property located in New York were dependent upon

New York law. As heretofore pointed out, that decision rests upon alternative grounds:

(1) That there was no foreign law applicable to the claims, inasmuch as the Soviet decrees did not purport to affect property in New York; and

(2) That under the circumstances here presented, rights to the property in question must be determined on the basis of New York law and not Russian law.

It is submitted that neither alternative ground of the decision presents a federal question.

The decision that the Soviet confiscatory decrees did not purport to affect assets in New York of the United States branch of a Russian insurance company was a determination of a question of fact, *i.e.*, the interpretation of foreign law, and it has long been settled that no federal question is presented by an allegedly erroneous interpretation of foreign law by a state court. *Phillips v. Mound City Association*, 124 U. S. 605; *Western Indemnity Co. v. Rupp*, 235 U. S. 261, 275. *Cf. Hanley v. Donoghue*, 116 U. S. 1, 4-6; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 394; *Grayson v. Harris*, 267 U. S. 352, 357, 358.

Even if, however, the state court had found that the Soviet decrees did purport to confiscate assets in New York and had rested its decision solely upon the ground that under the circumstances here presented rights to the property in question must be determined upon the basis of New York law and not Russian law, its decision would be merely a decision as to the New York rules of conflict of laws, and such a decision does not present a federal question under the due process clause of the Fourteenth Amendment to the

Constitution of the United States. *Kryger v. Wilson*, 242 U. S. 171. See *Bradford Elec. Co. v. Clapper*, 286 U. S. 145, 154; *Aetna Life Ins. Co. v. Tremblay*, 223 U. S. 185, 190; *Griffin v. McCoach*, 313 U. S. 498, 507; *Pacific Employers Insurance Co. v. Industrial Accident Comm'n.*, 306 U. S. 493, 500; *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 498.

The *Kryger* case involved a federal jurisdictional question arising under the due process clause. In that case the North Dakota courts had held that contract rights which arose in Minnesota to real property in North Dakota had been canceled by proceedings under North Dakota law. This Court affirmed the decision of the North Dakota courts and held (per Mr. Justice Brandeis) that doctrines of the conflict of laws are a part of the body of the common law, and an allegedly erroneous decision by a state court upon a point of conflict of laws does not raise a federal question under the due process clause of the Constitution of the United States. The authority of that case remains unimpaired in a situation wherein it is claimed that the due process clause has been violated by a conflict of laws decision of a state court refusing to enforce rights predicated upon the laws of a foreign government.*

As was said in *Bradford Elec. Co. v. Clapper*, 286 U. S. 145, 154:

"If the conflict presented were between the laws of a foreign country and those of New Hampshire, its [the New Hampshire] courts would be free, so

*It must be remembered that in *United States v. Belmont*, 301 U. S. 324, and in *Guaranty Trust Co. v. United States*, 304 U. S. 126, this Court reviewed decisions of the Second Circuit Court of Appeals, and not decisions of the New York Court of Appeals.

far as the restrictions of federal law are concerned, to attach legal consequences to acts done within the State, without reference to the undertaking of the parties, entered into at their common residence abroad, that such consequences should not be enforced between them. * * *

Therefore, even if it had been found that the Soviet decrees purported to confiscate for the benefit of the Soviet Government the assets in New York of a New York branch of a Russian insurance company, and if the decision below rested solely on the ground that rights arising in that manner are unenforceable under New York law, no question could be presented to this Court for review.

It is not necessary, however, to consider in this case the problems which would be presented if the decision below rested only on that ground. The decision of the court below can be rested on the independent and adequate non-federal ground that the Soviet decrees did not purport to affect the assets in question, and under such circumstances this Court should not take jurisdiction to review the decision of the New York court. *Fox Film Corp. v. Muller*, 296 U. S. 207; *Lynch v. New York*, 293 U. S. 52; *Wachtel v. Wilson*, 204 U. S. 36; *Johnson v. Risk*, 137 U. S. 100. As was said in *Lynch v. New York*, *supra*, (at pp. 4-55):

"It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon

surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * * Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

It is submitted, therefore, that the decision of the New York court in this case does not involve a federal question which is subject to review by this Court.

Respectfully submitted,

FREDERICK H. WOOD,
ALBERT RAY CONNELLY,
*Of Counsel for certain
Receivers, as amici curiae.*

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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 42

UNITED STATES OF AMERICA,

Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; Victor Yermaloff and Others.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

BRIEF ON BEHALF OF ANDREW DITMAR AND OTHERS, CREDITORS OF THE FIRST RUSSIAN INSURANCE COMPANY, AMICUS CURIAE

SAMSON SELIG,

**Counsel for Andrew Ditmar and other
creditors of the First Russian Insurance Company, Amicus Curiae.**

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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 42

UNITED STATES OF AMERICA,

Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; Victor Yermaloff and Others.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW YORK, NEW YORK COUNTY

**BRIEF ON BEHALF OF ANDREW DITMAR AND
OTHERS, CREDITORS OF THE FIRST RUSSIAN
INSURANCE COMPANY, AMICUS CURIAE**

The memorandum opinion of the Special Term Justice of the Supreme Court, New York County is unreported. The judgment and order was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York (First Judicial Department) without opinion (R. 57) reported in 259 App. Div. 871. The judgment was unanimously affirmed by a per curiam opinion of the

New York Court of Appeals (R. 71-72) reported in 284 N. Y. 555. The opinion of the New York Court of Appeals in *Moscow Fire Insurance Co. v. Bank of New York* is reported in 280 N. Y. 286.

Statement of Facts

The facts are set out fully in the other briefs submitted and we will not burden the Court with a repetition.

Interest of these Amici

This brief is submitted on behalf of more than 300 policyholders and creditors of the First Russian Insurance Company. Though they are parties to the action, they were not joined as parties to the motion by the Superintendent of Insurance, and therefore the brief is submitted amici. But they are parties to this action. They have been pursuing their rights in this litigation for ten years. Their claims, mostly for small amounts, were all allowed and adjudicated prior to the recognition of Russia. They have a vested interest.

Argument

There is no Federal question involved, as the case comes up merely on an order granting summary judgment on the ground that no substantial issue remained to be tried. Under the applicable New York law and practice the decision was right. This Court must affirm.

Petitioner seeks to obtain in this case what the Court has already denied, a reargument of the *Moscow* case. Petitioner is in error in contending that the *Moscow* case was decided by the Court of Appeals on the ground of State public policy, that the President in accepting the Litvinoff Assignment initiated a new Federal policy, or that the enforcement of the applicable New York law is in any sense a hostile act.

As successor to the First Russian, petitioner obtains no rights, since the interest of the First Russian has been disposed of by final judgment.

POINT I

There is no Federal question involved. The motion for summary judgment was properly granted.

After the affirmance by the Court of Appeals in the *Moscow* case (280 N. Y. 286), the Superintendent of Insurance moved for summary judgment dismissing the complaint in this action under Rule 113 of the New York Civil Practice Act. That motion is not in the nature of a demurrer or motion to dismiss for legal insufficiency, where the allegations of the complaint are deemed admitted, but is a motion to be made and opposed on affidavits or other evidence dehors the pleadings. The question to be determined is not in any way the sufficiency of the pleadings, but only whether a substantial issue remains to be tried. If the court determines that there is such an issue, the motion must be denied, the case proceeds to trial. If, on the other hand, the court finds there is no substantial issue, the court must grant the appropriate relief. If the motion is by the plaintiff for summary judgment, such judgment is awarded in advance of the trial; if the motion is by the defendant to dismiss, the complaint is dismissed. The motion is decided on the proof adduced apart from the pleadings themselves.

The petitioner repeatedly asserts that on the instant motion the allegations of the complaint were admitted. It is true that the Superintendent of Insurance also moved under Section 476 of the Civil Practice Act, which is a motion to dismiss for insufficiency, on which the allegations of the complaint are deemed admitted, but the court either ignored or denied that part of the motion. It plainly

4

appears that only the motion made under Rule 113 was granted. The court said, in granting the motion:

" * * * for an order dismissing the complaint and awarding summary judgment in favor of the defendant, * * * pursuant to Rule 113 of the Rules of Civil Practice" (R. 6).

"Any review of the court's action on the motion necessitates an examination of the outside evidence adduced. The Superintendent's affidavit showed that a trial would be a matter of supererogation, because the facts would necessarily have to be found to be identical with the *Moscow* case, and, of course, the applicable law would have to be the same. It was incumbent on the petitioner to submit to the court adequate evidence to disprove these contentions. What did it submit?"

An affidavit in which none of the issues now attempted to be raised were raised; in which there was no showing of new proof leading to different findings of fact upon the trial; nothing to show that if a trial were had there would be or could be a different result from the result reached in the *Moscow* case, but only a statement that petitioner had applied for a writ of certiorari in the *Moscow* case and a request that the motion be held in abeyance until this Court had passed upon the *Moscow* case. In other words, practically nothing but a request for an adjournment.

There was an utter failure on the part of petitioner to comply with the requirement of Rule 113, that the court must be shown by outside evidence that a substantial issue exists necessitating a trial. On the record before the New York court there was patently nothing to try, and consequently there was patently nothing left for the court to do but grant the motion. Petitioner specifically so admitted in its brief to the Court of Appeals, page 8:

"Plaintiff-appellant believes that the trial court was correct in its interpretation of the *Moscow* case, and that adherence to the decision in that case would require dismissal of the present complaint."

Thus the only question before the court was, and the sole question here is, whether under New York law and practice a substantial issue remained for trial. Even could this question, by any stretch of the imagination, be considered to include a Federal question, this Court, on this record, would be constrained to affirm. It is because the petitioner recognizes that as long as the *Moscow* decision stands, this judgment must be affirmed that it now seeks to obtain in this case what this Court has already denied, a reargument of the *Moscow* case.

But the record here presents no case for a reargument, nor does it disclose basis for arguments advanced in the 149 printed pages of petitioner's brief. It is not fair to this Court to ask that the complex questions posed in that brief be decided on this record. The petitioner has brought many other cases predicated on the Lityvinoff Assignment, in which on a proper record these questions may at the appropriate time be properly presented and decided by this Court. Petitioner should be remanded to them.

But were this Court to feel that on this record the door is open to a consideration of the petitioner's contentions, we submit that they must fail.

Petitioner's contention is that by the Soviet confiscatory decrees the Soviet secured title in invitum to the assets situated here of the domesticated branches of Russian insurance companies; that when the Court of Appeals decided the *Moscow* case on the extraterritorial intentment of the Soviet nationalization decrees, and also on the application of the New York Insurance Law, the Court did not mean what it said and did not decide on either of these grounds, but refused to give effect to the Soviet decrees only on the ground that they violated New York public policy; that the court had no right to deny effect to the Soviet decrees on that ground because the Executive in accepting the Lityvinoff Assignment had formulated and announced an "executive" policy approving of and forbidding any objection to the application of the confiscatory

decrees to property situated here; that the public policy of the State of New York was in conflict with the Federal public policy and that to follow the public policy of the State of New York would be a hostile act against the Soviet Government, which might even lead to war.

Petitioner is in error as to all these contentions.

POINT II

The Court of Appeals did not decide the *Moscow* case on the ground of State public policy, but decided it on an interpretation of the Russian law itself and on the New York Insurance Law.

Says the petitioner (p. 65):

"The decision was expressly based on the sole ground of the local public policy."

Says the Court of Appeals (*United States v. Moscow*, 280 N. Y. 286 at p. 314):

"The courts below have made the proper choice *not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy*, but because under the law of this state such confiscatory decrees do not affect the property claimed here."

"We deal here with a class of property and a juristic person *sui generis*" (at p. 307).

"The Insurance Law requires that before a foreign insurance corporation is permitted to do business here there must be a definite separation and division of its property and even of its juristic personality. . . . Thus the property of the United States branch of a foreign insurance company acquires a character of its own. That character is 'dependent' upon the law of this State. The property from its nature is subject to the laws of this State, and both the property and the 'complete and separate organization' analogous to a domestic corporation are immune from the control of any foreign power" (at p. 310).

It would seem plain from the above that the court's decision in the *Moscow* case was based on the specific provisions of the Insurance Law and the character that the property acquired thereunder, rather than on public policy, except, of course, as every law of every jurisdiction is necessarily inspired by and governed by its public policy, from constitutional provisions down to statutes of limitation.

Petitioner would have us believe that there is something new and unprecedented in the aspect from which the Court of Appeals viewed the status of the domesticated branches of all foreign insurance companies. Petitioner is in error. The view taken by the Court of Appeals in the *Moscow* case is in accord with old established New York law.

"Such corporations are deemed to be, for most legal purposes and as parties to actions, domestic corporations."

Standard Marine Ins. Co. v. Verity, 243 App. Div. 639, 640.

"It (foreign insurance corporation) owes to the law of its creation its franchise to be a corporation; but it owes to the law of this state the privilege of doing business within our borders. In exercising that privilege it may be dealt with as if it were in truth a domestic corporation. This view of its position has support in recent decisions. In *Morgan v. Mutual Benefit Life Ins. Co.* (189 N. Y. 447, 454) we held that for many purposes a foreign insurance company, transacting business here, must be treated as a domestic insurance company and as domiciled in this state."

Comey v. United Surety Co., 217 N. Y. 268, 274 (per Cardozo, J.)

"We think that the Legislature in allowing these foreign companies to do business in this State and country intended to treat the domestic agency largely as a complete and separate organization, to place it on a parity with domestic corporations."

Matter of People (Norske Lloyd), 242 N. Y. 148.

The New York Insurance Law, however, was only one and an additional ground upon which the decision was predicated in the *Moscow* case. The other and equally conclusive ground was that the Soviet confiscatory decrees themselves were not intended to have extraterritorial effect, nor to operate on property situate beyond the borders of Soviet Russia. Foreign law is a question of fact in New York (*Genet v. Del. & Hud. Canal Co.*, 163 N. Y. 173, 177). This construction of the Soviet law in the *Moscow* case had been so found as a fact by the Referee and his finding had been affirmed by the Appellate Division, which held:

"The evidence adduced before the referee sustains his finding that the Soviet decrees of confiscation against the assets of Russian insurance companies were not intended to apply to such assets as were situated outside of Russia and in the United States, but were intended to apply only to such assets as were situated in Russia."

Moscow Fire Ins. Co. v. Bank of New York, 253 App. Div. 644, 646.

These findings were binding on the Court of Appeals unless there was no evidence at all to sustain them, and, we submit, are equally binding on this Court (*General Pictures Co. v. Electric Co.*, 304 U. S. 175, 178; *New York ex rel. Water Co. v. Malibie*, 303 U. S. 158, 160; *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U. S. 86, 97; *Miedreich v. Lauenstein*, 232 U. S. 236, 243; *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 566).

There was ample evidence to sustain them: the *Moscow* record is replete with evidence that the Soviet decrees were not intended to apply extraterritorially. The scope of this brief does not permit of an analysis of that record, but we respectfully refer the Court to the full discussions on the point in the respondent's briefs submitted here on the *Moscow* appeal.

We may say, however, that the Soviet Government, as the Court of Appeals points out in the *Moscow* case (p. 307), "in official circulars and regulations itself gave similar interpretation to such decrees"; and "In a long series of decisions the courts of England have held that decrees by the Soviet government nationalizing the business of banking or insurance, cancelling obligations of banking and insurance companies and confiscating their property were not intended to apply to property of the companies with situs outside of Russia, or to obligations to be performed outside of Russia" (emphasis the court's) (*ibid.* at p. 306).*

* Some of the Circulars and Regulations and English decisions mentioned by the Court of Appeals are:

Circular No. 194, issued September 20, 1923, by the Commissariat of Justice, where it is stated:

"Proprietary rights of citizens of the R. S. F. S. R. enforceable outside the R. S. F. S. R. are governed by the laws of the country where they are to be enforced."

Circular No. 42, issued by the Soviet People's Commissariat for Foreign Affairs, where it is stated:

"The Law on Property established by the decrees of the Russian Soviet Government does, therefore, determine only legal relations pertaining to property rights as arise on the territory of the R. S. F. S. R. Legal relations pertaining to property rights whereof the subject-matter is situated outside the territory of the R. S. F. S. R. and is not connected with such territory cannot be governed outside the territory of the R. S. F. S. R. by Russian Law and are—irrespective of the nationality of the persons entitled to such rights, be they even Russian Citizens—subject to the effects of Local Law."

These circulars were construed as Russian law by Hill, J., in *The Jupiter*, P. (1927) 129, at 144; aff'd Court of Appeal, P. (1927) 250. In the latest declaration of the British courts on the subject, *In re Russian Bank for Foreign Trade, Chancery Decisions*, 1933, p. 745, Maughan, J., at p. 759, states:

"As will be seen later, the Soviet Government does not itself assert that the nationalization decrees have an extra-territorial effect."

And then goes on to say at page 767:

"The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. This follows, I think, from the decision of Hill, J., and the Court of Appeal in *The Jupiter*. It is interesting to note that the same view is taken by the R. S. F. S. R. itself in a circular dated April 12, 1922, and in a circular issued by the People's Commissariat of Justice to all District Courts dated September 26, 1923, which are set out in the elaborate judgment of Hill, J., above referred to. These circulars show that the Soviet Government does not regard the nationalizing decrees as having any extra-territorial effect even as against Russian citizens."

These circulars were similarly interpreted by the French courts: *Etat Russe v. Cie Russe Ropit*, *Gazette du Palais*, 1925, 2, 167; aff'd *Gazette du Palais*, 1926, 1, 169.

Petitioner's brief skates deftly away from discussion of this ground of decision in the *Moscow* case. Thus petitioner says:

"The complaint alleges and the motion admits that the Soviet nationalization decrees were intended to apply to the assets of the First Russian Insurance Company in New York."

But, as we have shown, a motion under Rule 113 does not admit the allegations of the complaint.

Again, petitioner says:

"There are other considerations which compel the conclusion that the court below did not pass upon the issue of the scope of the Soviet decrees. The respondent did not raise this issue for purposes of the motion. Indeed, it is extremely doubtful under New York law whether he could have raised the issue on the actual pleadings filed. That the court below did not decide this question of practice is shown by the fact that the sole authority for its decision was the *Moscow* case, in which the question was not involved."

The draftsman must have written the above with his tongue in his cheek. The moving affidavit on the motion for summary judgment said:

"that no decree *could possibly have intended to apply to business conducted here*, and if so intended, could not be binding here" (Downes affidavit on the motion to dismiss [fol. 41]).

But, beyond that, the entire motion was based on the issues and findings in the *Moscow* case, where hundreds of pages of testimony were taken, where the referee's opinion, the Appellate Division's opinion and the Court of Appeals' opinion are all directly predicated on the intentment of the Soviet decrees. How, under such circumstances, petitioner can say that the question was not involved in the *Moscow* case passes our comprehension.

POINT III

In accepting the Litvinoff Assignment the Executive did not formulate any new or different Federal public policy as to the application of Soviet confiscatory decrees to property here.

Assuming that the *Moscow* decision was based on New York public policy, petitioner says this public policy went into the discard because the President of the United States, in accepting the Litvinoff Assignment, initiated a new "executive" public policy by virtue of which we adopted as our public policy the Soviet policy of confiscation, and no objection may be interposed to it in the courts.

* We cannot imagine a statement more unfair to the President of the United States. He is the last man to overturn the settled public policy of the United States against confiscation, embedded in our Constitution and one of the "four freedoms" of our form of government. If it could be conceived that he had intended such a thing, through the means of a mere executive agreement, it is inconceivable that he would not in plain language have said so, rather than have left so unprecedented a reversal of our traditional policy to implication and inference.

Our own Government in times of peace is without power to take without compensation the property of alien friends and give it to others in defiance of the final judgment of the courts administering it. That the President should initiate a policy permitting a foreign government to do it is unthinkable.

If it could be conceived that he intended such a thing, there would be the gravest doubt of his power to do so.*

* This has heretofore been the view of the Executive Department itself:

In 1883 the Canadian Parliament authorized the erection of a bridge across Niagara River; work not to begin "until an act of the Congress of the United States of America has been passed, consenting to or approving the bridging

Fortunately, we do not have to consider either his intent or his power in the premises. This Court has already defined the rights acquired under the Litvinoff Agreement. In *Guaranty Trust Co. v. United States*, 304 U. S. 126, after quoting the relevant parts of the assignment and the President's acceptance thereof, it is said at page 143:

"There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."

Even clearer is the holding in petitioner's "Ark of the Covenant", *United States v. Belmont*, 301 U. S. 324, where the court said:

"Neither the allegations of the bill of complaint, nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any state policy is to be overridden."

of said river, or until the Executive of the United States, has consented to and thereof approved." The President asked the Attorney General for his opinion as to the President's power in the premises. The Attorney General replied (17 Op. Atty. Gen. 523):

"The President can perform no act *officially* except it be authorized by the Constitution and laws. His consent in the present case, not being thus authorized, would be an extra official act."

"I beg to refer, in this connection, to an opinion of Attorney-General Cushing, in a case in which a similar question arose. A legislative act of a British colony provided for certain proceedings for the arrest and punishment of deserting seamen of any foreign nation, where the government of such nation or state had by its proper officer signified its desire that the act might be enforced against the crews or ships belonging to such nation or state. The inquiry was, whether the President of the United States, as such, had authority, by so signifying his desire, to give general effect to that act. It was held that he had not. 'Neither the Constitution of the United States, nor the treaties between this Government and that of the United Kingdom, nor any acts of Congress (observes Mr. Cushing) empower the President to communicate to the law of a foreign state authority or effect, which it does not possess *proprio vigore* as a law of such foreign state' (6 Opin. 209).

After quoting the Litvinoff Assignment and the President's acceptance, the opinion continued:

"There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor, or that the President, by mere executive action, purported or intended to alter the laws and policy of any state in which the debtor of an assigned claim might reside, or that the United States, as assignee, is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity with those laws."

There was no dissent from this holding in the other opinion in the *Belmont* case and the subsequent unanimous holding of the same court to the same effect in the *Guaranty Trust* case, *supra*, establishes beyond cavil that the acceptance of the Litvinoff Assignment did not propound any new executive policy and was neither meant to nor did override State law.

But we say that the President went further and actually confirmed and protected the judgments of the courts and the rights of litigants as to property situate here of Russian nationalized corporations. We say that was the purpose and the only purpose of the last paragraph of the Litvinoff Assignment.

It will be recalled that by the ~~first~~ paragraph of that assignment the Soviet Government releases and assigns all amounts admitted to be due or that may be found to be due it, and the second paragraph reads as follows:

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of

Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

This is an unusual undertaking. The rights which the Soviet further agreed not to make claim to could not have been the same rights that had already been assigned in the first paragraph, for if they had already been assigned, of course the Soviet could make no claim to them. Does one assign a chose in action and then agree not to lay claim to it? Does one convey title and agree not to attack the title? That would not be expected where the contracting parties are the humblest citizens. It is unthinkable where the contracting parties are the heads of mighty nations.

The conclusion seems inescapable that the claims referred to in the first paragraph of the letter, and thereby assigned to the United States and "the property, rights, or interest" of Russian nationals referred to in the paragraph marked (a), were not the same rights. But the rights referred to in paragraph (a) clearly include the right which is the subject of this litigation, since it is a right in which a Russian national "may have had or may claim to have an interest" covered by the final judgment of an American court. That right was not assigned to the United States Government.

In this light the purpose of the last paragraph of the assignment becomes clear. At the recognition of Russia there were two kinds of Russian property here.

1. Immense sums running into millions, which had been deposited and were the property of prior Russian governments. Also many claims of the Russian Government

against various American corporations for breach of contract, the claim of the Russian Volunteer Fleet, a former Russian governmental corporation (not a private Russian corporation like an insurance company)* and the funds here of various ephemeral governments established during the Revolution in parts of Russia (*Nankivel v. Omsk*, 237 N. Y. 150).

These claims the Soviet had acquired by succession to former Russian governments, not by confiscation:

2. There was the property here of Russian corporations, most of which had been nationalized.

The intent of the Litvinoff Assignment was plainly that the Russian governmental funds as to which there had never been confiscation were to be assigned and collected by the United States, and by the last paragraph of the Litvinoff Assignment the other funds, nearly all of which had been in constant litigation and subject to many orders

* For example:

Several million dollars in the National City Bank as to which a suit was then pending in the United States District Court for the Southern District of New York, entitled "*State of Russia v. Bankers Trust Company and National City Bank, defendants*" (69 Fed. [2d] 44).

Again, there was a claim for \$4,976,722.78, with interest, being monies deposited by the former Russian Government with the Guaranty Trust Company of New York (*United States v. Guaranty Trust Co.*, 304 U. S. 126);

There was also a claim for \$15,000 against the Guaranty Trust Company of New York arising out of a contract between the Russian Government and the Morton Trust & Tractor Company;

There was also a claim of the Russian Government for approximately \$1,050,000 against the Curtiss Aeroplane and Motor Company;

There was also a claim for approximately \$384,118.07, with interest, for monies due from the Canadian Pacific Railways Company under contracts with the Russian Government;

There was also a claim for approximately \$1,412,532.35, with interest, on account of the amounts due from the United States Shipping Board for the requisition of Hulls Nos. 6 and 7 of the Russian Volunteer Fleet; a claim for approximately \$218,750 originally deposited with the Guaranty Trust Company as escrow money on Hull No. 6 under contract for the purchase of the said hull by the Russian Volunteer Fleet; a claim for the sum of approximately \$23,643.75 on account of balance due from the United States Shipping Board in connection with the charter of certain steamers of the said Russian Volunteer Fleet. (*Record, United States v. Bank of New York*, 296 U. S. 364, p. 19.)

and judgment of the courts,* were left diplomatically undisturbed. In *State of Russia v. National City Bank*, 69 F. (2d) 44, cert. den. 299 U. S. 563, the court, in speaking of the assignment, said:

"Moreover, it is apparent that the intent was to assign all the claims of the Soviet Government to the United States, and it agreed to leave undisturbed diplomatically final non-appealable judgments and decrees of the American courts touching Russian affairs and non-judicial acts done in good faith by and with the officials of the previously recognized government of Russia, or its nationals, relating to property, credits or obligations of any government of Russia or nationals thereof."

Thus it is apparent that in accepting the Litvinoff Assignment the President protected creditors of nationalized Russian corporations rather than despoiled them and that he initiated no new Federal policy than the policy which had existed from the founding of the Republic, and which this court in numberless decisions has been especially jealous to defend and preserve.

Russian Volunteer Fleet v. United States, 282 U. S. 481.

Yick Wo v. Hopkins, 118 U. S. 356.

Baglin v. Cusiniér, 221 U. S. 580†

Petitioner, however, claims that *United States v. Belmont*, 301 U. S. 324, overturns the long line of this court's decisions to which reference has been made, and claims

* *Sokoloff v. National City Bank*, 239 N. Y. 138; *Petrogradsky M. R. Bank v. National City Bank*, 253 N. Y. 23; *Friede v. National City Bank*, 250 N. Y. 288; *Sliosberg v. New York Life Ins. Co.*, 244 N. Y. 482; *Severnice Sec. Corp. v. London & Lancashire Ins. Co.*, 255 N. Y. 120; *First Russian Insurance Co. v. Beha*, 240 N. Y. 601; *Russian Reinsurance Co. v. Stoddard*, 240 N. Y. 149; *Matter of People, Russian Reinsurance Co.*, 255 N. Y. 415, 423; *Matter of People, Northern Insurance Co.*, 255 N. Y. 433; *Matter of People, Second Russian Insurance Co.*, 255 N. Y. 437; *Matter of People, First Russian Insurance Co.*, 255 N. Y. 440, and a host of others.

† The rule against taking of property under foreign law in violation of local law finds expression in the decisions of all State courts. Typical are:

State v. Bush, (12 Ala. App. 309) 1915, p. 311.

"The principle that no man shall be deprived of his liberty or property except by 'the law of the land' is said to be more ancient than

that the *Belmont* case, which it has cited many times and to which it has devoted pages of its brief, lays down the rule that the Soviet decrees of confiscation have legal authority to override the rights of creditors here, and that they have become the supreme law of this land, with the same force and effect as they are the law of Soviet Russia.

The claim that this Court has ever so held is startling, and necessitates an analysis of the *Belmont* decision, to ascertain whether such is really the holding.

In the *Belmont* case the Government had started an action at law to recover a bank deposit which the Petrograd Metal Company, a Russian corporation, had had with August Belmont. The Belmont executors moved to dismiss the complaint for insufficiency. The question being the sufficiency of the complaint, its allegations had to be taken as true, including the allegation that the Soviets had acquired title to the property of the Petrograd Metal Company here. In the *Belmont* case there were no adverse claims to the fund. So far as the record showed there were no creditors of the Petrograd Metal Company. There were no stockholders. Not even the corporation itself defended.

The Belmonts, asserting no claims against the deposit themselves, occupied the position of a naked custodian

written constitutions, and breathes so palpably of exact justice that it needs no formulation in the organic law."

Ex parte Dickenson, 29 S. C. 453 (1888).

"It has been frequently held in this State that the laws of a foreign State governing the disposition of an insolvent's State have no application here, proprio vigore to property of the insolvent resident in another State, for the obvious reason that the laws of a State are necessarily territorial, so far as other independent States are concerned."

Baldwin v. Hosmer, 101 Mich. 419 (1894) at p. 433.

"It is a principal now generally acted upon by the Courts that a receiver or other trustee appointed in another state will be permitted, on the principle of comity, to bring an action in the domestic forum for the purpose of collecting the assets of the insolvent for distribution, in accordance with the laws of the jurisdiction within which the receiver has been appointed, when to do so will not contravene the rights of citizens of the state in which the action is brought. But the rule of comity is never allowed to operate when it will contravene the rights of a citizen of the state where the action is being taken."

against whom the United States Government, as the assignee of the government of the domicile of the defunct corporation, made a demand for its assets. In that situation the element of confiscation is so emasculated as to lose its vigor. This Court held there was no reason of public policy which prevented giving effect to the Soviet decrees.

In both the majority and minority opinions the court, however, went to the most unusual lengths to limit their holding to a suit against a custodian only, and to prevent what they said in the *Belmont* case from being applied to a case of a different nature where there were creditors and adverse claimants.

The majority said:

"It does not appear that respondents have any interest in the matter beyond that of a *custodian*. Thus far no question under the Fifth Amendment is involved.

"It results that the complaint states a cause of action and that the judgment of the court below to the contrary is erroneous. In so holding, we deal only with the case *as now presented and with the parties now before us*. We do not consider the status of adverse claims, if there be any, of others not parties to this action. And *nothing we have said* is to be construed as foreclosing the assertion of any such claim to the fund involved, by intervention or other appropriate proceeding. We decide only that the complaint alleges facts sufficient to constitute a cause of action *against the respondents*."

The minority said:

"As *respondent debtor* may not challenge the effect of the assignment to the United States, the judgment is rightly reversed. But as the reversal is without prejudice to the rights of any other parties to intervene, they should be left free to assert, by intervention or other appropriate procedure, such claims with respect to the amount due as are in accordance with

the laws and policy of New York. There is no occasion to say anything now which can be taken to foreclose the assertion by such claimants of their rights under New York law."

The use which the Government is now trying to make of the Belmont case is a clear defiance of the caveat contained in both opinions.

Ever since the *Belmont* case the Government has repeatedly tried to advance it as a panacea for every sickness that is inherent in the contention that our courts will permit a foreign decree to reach over and confiscate property situate in this country, but this interpretation of that decision has been rejected by every court to which it has been submitted.

This Court rejected it in *United States v. Guaranty Trust Co.*, 304 U. S. 126.

The Court of Appeals rejected it in *United States v. President & Directors of the Manhattan Company*, 276 N. Y. 396, as follows:

"We find that the decision in the Belmont case goes no further than to hold, in so far as it may be applicable here, that recognition must be given to the validity of the confiscation decree by which the assets of the insurance company located in this country became the property of the Soviet Government and by it were passed on by assignment to the plaintiff in so far only as the act of confiscation did not interfere with the rights and equities of our nationals in such property and of adverse claimants thereto to the extent that our courts may be opened to them for the assertion of their claims. To the extent indicated the assignment of November 16, 1933, from the Soviet Government to plaintiff has been held valid by the decision in the Belmont case."

In a case involving the Belmont funds (*Meyer v. Petrograd Metal Works*, N. Y. Law Journal, p. 1163, October 17, 1938, aff. 256 App. Div. 1077, appeal denied 281 N. Y. 887) Mr. Justice May said:

"Two opinions were handed down by that court (United States Supreme Court, in *U. S. v. Belmont*) upon the reversal. Both opinions painstakingly pointed out that the decision was being limited to the very pleadings and parties before the court. The only parties before the court were the Belmont estate, as a mere depositary of the funds without claim or offset against it, and the government.

"There is no doubt that the United States Supreme Court did not in any way determine the rights of this receiver or any other claimant to the fund, but expressly preserved those rights to them."

The *Belmont* case is, therefore, no authority at all for the proposition that there is a Federal law as opposed to State law under which the Soviet Government could obtain by confiscation rights to property in New York paramount to those of creditors and stockholders, and contrary to the law of the State.

POINT IV

Application of New York law is not a hostile act.

Perhaps the most farfetched of all petitioner's contentions is that the enforcement of the New York public policy as to assets situated in the forum would constitute a hostile act.

For many years and in many parts of the world the courts have been called upon to construe the effect of the Russian confiscatory decrees. In every case that we have been able to find, every court to whom the question has been presented has decided that the Soviet confiscatory decrees of nationalization were incompetent to pass title to assets situate beyond Soviet borders. The courts have

been unanimous in so holding, irrespective of whether the question was presented to them before or after recognition of Soviet Russia by their respective governments.*

Typical of the rationale of such decisions are the following:

"The French courts will not give effect in France to the legislative acts of a foreign corporation *even though recognized* when they are contrary to French public policy and will not give any effect to those decrees which in opposition to the principle contained in Article 545 of the Civil Code, pronounce the pure and simple confiscation of private property.

"From which it follows that the Soviet decrees cannot invest the Russian State with the rights which the Russian Transport Company possessed in France."

Cockerill v. La Union et Phenix Espagnol Cour d'appel de Paris, (Ire. Ch.) 23 Decembre, 1930.

* Among the jurisdictions where such holdings have been rendered, the following may be noted:

The House of Lords, after recognition, allowed the English branch of a nationalized Russian company to recover its English assets by liquidation under the Companies Act (*Russian and English Bank v. Baring Bros.*, [1936] A. C. 405); the Court of Cassation, after recognition, ruled that a Soviet decree of nationalization "cannot be enforced by a French court of law either directly or indirectly" (*Etat Russe v. Cie Russe Kopit*, 55 Clunet 674 [1928]); after recognition, the Supreme Court of Denmark refused to allow the Soviet to recover assets in Denmark claimed by reason of the Soviet's confiscatory decrees (*Counsel of Russian Orthodox Community in Copenhagen v. Legation of R. S. F. S. R.*, [1925-26] Ann. Dig. of Int. L. Cases 24); the court of last resort in Sweden ruled that a czarist corporation may recover its assets in that country despite dissolution at home by the Soviet (*Nebolsine, Recovery of Foreign Assets of Nationalized Russian Corporations*, 39 Yale L. J. 1130, 1146); the Mixed Arbitration Court for the determination of Franco-German claims after the World War held Soviet decrees which nationalized the Russian branch of a French bank inoperative to discharge the bank from liability to a German depositor (*E. Meyer & Son v. Credit Lyonnais*, Tribunaux Arbitraux Mixtes, Recueil des Décisions, Vol. 3, p. 857; Second Part, July 30, 1923); the Mixed Arbitration Court for the determination of Anglo-German claims made the same decision in the converse case of an English corporation whose branch in Russia, subsequently nationalized, had contracted a debt to a German bank (*Deutsche Bank A. G. v. Scottish Herring Import and Export Co., Ltd.*, Tribunal Arbitral Mixte Anglo-Allemand [1st Division], 1st December-1926, 15th and 22nd, July, 1927, Case No. 2293).

See also: Switzerland: *Wilbuschewitz v. Zurich* (1926); 53 Clunet. 1110, 1113 (Trib. Fed.) (1925-26); Ann. Dig. of Int. L. Cases 96 (before recognition). Germany: *Ginsberg v. Deutsche Bank* (1928); Juristische Wochenschrift 1232, 1233 (Kammergericht, Berlin) (after recognition). England: *The Jupiter* (No. 3), 1927, p. 122; aff'd Ct. of Appeal, 1927, p. 250 (after recognition).

"Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country" (England).

Employers Liability v. Sedgwick, (1926) 1 K. B. L.

The New York courts have held to the same effect:

Petrogradsky M. K. Bank v. National City Bank,
253 N. Y. 23 (before recognition).

James & Co. v. Second Russian Insurance Co., 239
N. Y. 248 (before recognition);

Vladikavkazsky Ry. Co. v. New York Trust Co., 263
N. Y. 369, 264 N. Y. 599 (after recognition).

In *James & Co. v. Second Russian Insurance Co.*, supra, the court said:

"As to the Soviet decree, we think its attempted extinguishment of liabilities is *brutum fulmen*, in England as well as here, and this whether the government attempting it has been recognized or not. Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum (*Barth v. Backus*, 140 N. Y. 230; *Matter of People [City Equitable Fire Ins. Co.]*, 238 N. Y. 147, 152; cf. *Matter of Barnett's Trusts*, 1902, 1 Ch. 847)."

In *Vladikavkazsky Ry. Co. v. New York Trust Co.*, supra, the court said:

"It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. (*Baglin v. Cusenier*, 221 U. S. 580)."

The Federal courts have held to the same effect:

Lehigh Valley R. Co. v. State of Russia, 21 F. (2d) 396, 401.

United States v. Bank of New York & Trust Co., 10 Fed. Supp. 269.

In the case last cited Judge Coxe, speaking in the Government's suit to obtain the identical funds which are the subject of the instant suit, said:

"The confiscatory decrees of the Soviet Government were clearly opposed to the public policy of the United States. *Russian Volunteer Fleet v. U. S.*, 282 U. S. 481, 491, 492; *Petrogradsky M. K. Bank Co. v. National City Bank*, 253 N. Y. 23; *Vladikavkazsky Ry. Co. v. N. Y. Trust*, 263 N. Y. 369; *Baglin v. Cusenier*, 221 U. S. 580. They were utterly ineffective to reach the properties of the Moscow and Northern Companies in this country; *Vladikavkazsky Ry. Co. v. N. Y. Trust (supra)*; *Baglin v. Cusenier (supra)*; *The Jupiter*, 96 L. I. P. 62 (1927); *Employees Liability v. Sedgwick*, 1927, A. C. 95; and the subsequent recognition of the Soviet Government in no way changed the confiscatory nature of the decrees in so far as these particular funds were concerned. *Lehigh Valley v. State of Russia*, 21 Fed. (2) 396, 401; *Vladikavkazsky Ry. Co. v. N. Y. Trust (supra)*."

In none of these forums did the court take the view that the enforcement of its public policy and other municipal law as to assets within the jurisdiction would constitute a hostile act.

As we have seen, the Soviet authorities themselves did not consider that their decrees applied to property situated extraterritorially. They have never protested or taken umbrage at such decisions, nor indeed could they.

No government, so far as we have been able to ascertain, has ever expected courts of other countries to enforce foreign laws which have conflicted with the laws of the forum. The refusal to do so is no hostile act. Indeed, a foreign

government has access to the courts at all only as a matter of comity (*The Supphire*, 11 Wall. 164, 167; *Russian Republic v. Cibrario*, 235 N. Y. 255, 262), and foreign laws of any kind are given effect only as a matter of amenity and not as a matter of right (*Huntington v. Atrill*, 146 U. S. 657). Indeed, some foreign laws are not given effect at all. It is well known that we do not enforce the penal (*Wisconsin v. Pelican*, 127 U. S. 265) or tax laws (*Colorado v. Herbeck*, 232 N. Y. 71) of a foreign state, and as a general matter we do not enforce any of their public laws (*Frenkel v. L'Urbaine*, 251 N. Y. 243).

No one, of course, disputes the doctrine that recognition of a foreign state gives retroactive effect to the acts of a foreign government *done in its own domicile*. That is the doctrine of cases like *Luther v. Sagor*, (1921) 3 K. B. 532, and *Oetjen v. Central Leather*, 246 U. S. 297, so often quoted by the petitioner. But a sharp line of distinction has always been drawn between giving recognition to foreign laws, to acts done and to titles acquired in the foreign jurisdiction, and giving effect to those laws as to property situated in the jurisdiction of the forum if the foreign law conflicts with the law of the forum. It is this distinction which the petitioner persistently ignores.

Of course, the courts will not sit in judgment over the acts of a foreign power done within its own confines as to property situated in its own confines, but enforcement of the local law, which all courts are sworn to enforce, over property locally situate is not to pass judgment on the acts of a foreign power. Indeed, to compel enforcement as to local property of any and all laws which a foreign government might pass regardless of any conflict between foreign and local law would be to introduce endless confusion. Nobody could know the status of foreign owned property locally situate. If this doctrine is to be introduced into our law it will indeed be welcomed with open arms by all foreign jurisdictions. Especially the totalitarian countries would like nothing better than to have all of

their discriminatory, confiscatory, punitive and racial laws and decrees enforced here. Foreign governments do not expect such a thing, let alone regard its denial as a hostile act. When a foreign sovereign goes into the local forum it must take the common fare of the court.

In *Queen of Holland v. Drukker*, (1928) Ch. 877, 884, the court said in dismissing the action:

“ * * * as the sovereign State has submitted to jurisdiction by coming here I am in a position to order the sovereign State to pay the costs of the action.”

In *Otho, King of Greece v. Wright*, 6 Dowl. 12 (1837), the court rejected the argument that the exaction of costs from a foreign sovereign would be an exercise of authority contrary to the comity of nations and to the courtesy displayed by independent sovereigns toward each other. At page 17 the court said:

“If a foreign prince sends over here to enforce his alleged rights in our courts, he must be subjected to the ordinary rules to which other suitors are liable, and more particularly in commercial dealings.”

In *Republic of Honduras v. Soto*, 112 N. Y. 310 (1889), the New York court pointed out that the Republic of Honduras, though a recognized foreign government, fell under the category of non-resident persons obliged to give security. In *Republic of Costa Rica v. Erlanger*, (1875) L. R. 1 Ch. D. 171, 174, Blackburn, J., said that a foreign sovereign plaintiff “should, so far as the thing can be done, be put in the same position as a body corporate”. To the same effect is *Republic of Peru v. Weguelin*, (1875) L. R. 20, Eq. 140, 141.

In *King of Spain v. Hullett*, (1833) 7 Bligh N. S. 359, Lord Brougham said (p. 392):

“The right of the King of Spain in respect of privilege in the courts of England, is not greater than that

of any of his subjects. If he can bring his privilege with him, why may not his subjects also? One objects to answer upon oath; another may object to a trial by a jury of tradesmen. But if the King is recognized in the character of a suitor, must he not be content with the common fare of the court? * * * The more the question is discussed the more clear it appears."

Even a domestic sovereign takes the status of a private litigant.

"When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject-matter. The absence of legal liability in a case where, but for its sovereignty it would be liable does not destroy the justice of the claim against it."

United States v. The Thetla, 266 U. S. at 339, 40.

"When the United States comes into court and institutes a suit for redress, not based on any infringement of its sovereignty and not for any violation of its governmental prerogatives, and submits a claim wholly in the nature of a private litigant, it, by implication, waives any immunity as sovereign and its adversary is entitled to set up any defense which would be available to him were his opponent another citizen instead of the government."

United States v. Moscow-Idaho Seed Co., 92 F. (2d) 170, 173.

POINT V

As successor to the First Russian Insurance Company, petitioner obtains no rights, since the interest of the First Russian has been disposed of by final judgment.

Petitioner now claims that the only relief it seeks is not title to the assets of the First Russian but merely to be recognized as its successor, with such rights as the

First Russian Insurance Company would have had had it not been dissolved. This must be an afterthought. The relief hitherto sought has consistently been the seizure of all of the assets of the First Russian and the taking of them from the possession of the Superintendent, but if petitioner now wishes to modify its demands and merely step into the shoes of the despoiled insurance company it will not be in better case. Any rights the First Russian Company ever had to the funds were admittedly subject to the Insurance Law and the disposition of its assets by the New York courts acting under that law. Such disposition was made by the courts long ago in a proceeding in rem, concluded long prior to Russian recognition and binding in every way upon the First Russian Insurance Company, its successors and assigns (255 N. Y. 415).

It is elementary that the Government can have no greater right to the fund than its assignor had (*United States v. Buford*, 3 Pet. 12). Equally, it is patent that the Soviet Government could acquire by confiscation only such rights therein as the First Russian Insurance Company had.

What, therefore, were the rights which the First Russian itself had to the fund in question?

It is undisputed that the res now in suit consists of what is left of securities originally deposited here by the First Russian Insurance Company under an express trust, pursuant to the requirements of New York law following its license to do business here.

Such assets of foreign insurance companies are subject to seizure by the Superintendent of Insurance in liquidation proceedings and to their ultimate disposition by the court at the conclusion of such proceedings.

It is therefore evident that the interest from the beginning of the First Russian Insurance Company in the fund so deposited here was not an unconditional title or even an unconditional right to possession, but, on the contrary, was purely a reversionary interest in what remained, if anything, after the disposition of the assets by the court in possible liquidation proceedings.

Obviously the First Russian Insurance Company itself could not have withdrawn or disposed of these funds even after payment of its creditors until the court had relinquished possession thereof. As Chief Justice Hughes well pointed out, in *United States v. Bank of New York and Trust Co. et al.*, 296 U. S. 463, in speaking of the identical res:

"The court still had control of the property and necessarily had the pertinent equitable jurisdiction to decide what should be done with it."

Acting under this equitable jurisdiction, the court did decide what should be done with it.

It ordered the Superintendent of Insurance to proceed with the present liquidation: *Matter of People (First Russian)*, 255 N. Y. 415.

Hence nothing remained to revert to the First Russian Insurance Company at any stage of the proceedings. The order entered on the remittitur of the Court of Appeals is res adjudicata against the First Russian Insurance Company, and particularly against the Soviet Government.

The law in this connection is most aptly stated in *United States v. Bank of New York and Trust Co.*, 72 F. (2d) 876:

" * * * in the interregnum between the establishment of a foreign government in power and its recognition by this government, * * * whatever has been done in the courts with legal finality * * * must be regarded as *res adjudicata* and valid as against the world. * * * "

Therefore, as far as these New York assets were concerned, there was never left any equity or reversionary interest for the Soviet nationalization decree to confiscate. There was nothing left which the First Russian Insurance Company itself could have obtained. The Soviet Government would be in worse case in a court of equity than even the First Russian, as the direct cause of the liquidation of the First Russian here was the fact that the Soviet Government had confiscated its property in Russia.

The Soviet Government may not come into a court of equity and enrich itself through its own wrong. The maxim that "he who seeks equity must do equity" never had a better application.

The record here does not justify, nor do the limits of this brief permit, a discussion of all the issues raised in the *Moscow* case, and for a full analysis of them we respectfully refer to the briefs filed by the respondents with this Court on the argument of the *Moscow* case. They demonstrate, we submit, that on both law and fact the decision below must be affirmed.

Long ago a great Chief Justice of this Court, John Marshall, in *Fletcher v. Peck* (6 Cranch 87, 135), said:

"It may be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"

His pronouncement for this Court one hundred years ago will not be departed from now.

CONCLUSION

The writ should be dismissed or the judgment below should be affirmed.

Respectfully submitted,

SAMSON SELIG,

Counsel for Andrew Ditmar and other
creditors of the First Russian Insurance Company, Amicus Curiae.

Transcript - 8. 2, 6

SUPREME COURT OF THE UNITED STATES.

No. 42.—OCTOBER TERM, 1941.

The United States of America,
Petitioner,
vs.

Louis H. Pink, Superintendent of Insurance of the State of New York,
et al.

On Writ of Certiorari to
the Supreme Court of the
State of New York.

[February 2, 1942.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

This action was brought by the United States to recover the assets of the New York branch of the First Russian Insurance Co. which remained in the hands of respondent after the payment of all domestic creditors. The material allegations of the complaint were in brief as follows:

The First Russian Insurance Co., organized under the laws of the former Empire of Russia, established a New York branch in 1907. It deposited with the Superintendent of Insurance, pursuant to the laws of New York, certain assets to secure payment of claims resulting from transactions of its New York branch. By certain laws, decrees, enactments and orders in 1918 and 1919 the Russian Government nationalized the business of insurance and all of the property, wherever situated, of all Russian insurance companies (including the First Russian Insurance Co.), and discharged and cancelled all the debts of such companies and the rights of all shareholders in all such property. The New York branch of the First Russian Insurance Co. continued to do business in New York until 1925. At that time respondent, pursuant to an order of the Supreme Court of New York, took possession of its assets for a determination and report upon the claims of the policyholders and creditors in the United States. Thereafter all claims of domestic creditors, i.e., all claims arising out of the business of the New York branch, were paid by respondent, leaving a balance in his hands of more than \$1,000,000. In 1931 the New York Court

of Appeals (255 N. Y. 415) directed respondent to dispose of that balance as follows: first, to pay claims of foreign creditors who had filed attachment prior to the commencement of the liquidation proceeding and also such claims as were filed prior to the entry of the order on remittitur of that court; and second, to pay any surplus to a quorum of the board of directors of the company. Pursuant to that mandate, respondent proceeded with the liquidation of the claims of the foreign creditors. Some payments were made thereon. The major portion of the allowed claims, however, were not paid, a stay having been granted pending disposition of the claim of the United States. On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the *de jure* Government of Russia and as an incident to that recognition accepted an assignment (known as the Litvinov Assignment) of certain claims.¹ The Litvinov Assignment was in the form of a letter, dated November 16, 1933, to the President of the United States from Maxim Litvinov, People's Commissar for Foreign Affairs, reading as follows:

"Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Government of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claims with respect to:

- (a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or

¹ See Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1 (1933) for the various documents pertaining to recognition.

interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

- (b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

This was acknowledged by the President on the same date. The acknowledgement, after setting forth the terms of the assignment, concluded:

"I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet."

On November 14, 1934, the United States brought an action in the federal District Court for the Southern District of New York, seeking to recover the assets in the hands of respondent. This Court held in *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, that the well settled "principles governing the convenient and orderly administration of justice require that the jurisdiction of the state court should be respected" (p. 480); and that whatever might be "the effect of recognition" of the Russian Government, it did not terminate the state proceedings. p. 479. The United States was remitted to the state court for determination of its claim, no opinion being intimated on the merits. p. 481. The United States then moved for leave to intervene in the liquidation proceedings. Its motion was denied "without prejudice to the institution of the time-honored form of action". That order was affirmed on appeal.

Thereafter, the present suit was instituted in the Supreme Court of New York. The defendants, other than respondent, were certain designated policy holders and other creditors who had presented in the liquidation proceedings claims against the corporation. The complaint prayed, *inter alia*, that the United States be adjudged to be the sole and exclusive owner entitled to immediate possession of the entire surplus fund in the hands of the respondent.

Respondent's answer denied the allegations of the complaint that title to the funds in question passed to the United States and that

the Russian decrees had the effect claimed. It also set forth various affirmative defenses—that the order of distribution pursuant to the decree in 255 N. Y. 415 could not be affected by the Litvinov Assignment; that the Litvinov Assignment was unenforceable because it was conditioned upon a final settlement of claims and counter claims which had not been accomplished; that under Russian law the nationalization decrees in question had no effect on property not factually taken into possession by the Russian Government prior to May 22, 1922; that the Russian decrees had no extraterritorial effect, according to Russian law; that if the decrees were given extraterritorial effect, they were confiscatory and their recognition would be unconstitutional and contrary to the public policy of the United States and of the State of New York; and that the United States under the Litvinov Assignment acted merely as a collection agency for the Russian Government and hence was foreclosed from asserting any title to the property in question.

The answer was filed in March, 1938. In April, 1939 the New York Court of Appeals decided *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286. In May, 1939 respondent (but not the other defendants) moved pursuant to Rule 113 of the Rules of the New York Civil Practice Act and § 476 of that Act for an order dismissing the complaint and awarding summary judgment in favor of respondent "on the ground that there is no merit to the action and that it is insufficient in law". The affidavit in support of the motion stated that there was "no dispute as to the facts"; that the separate defenses to the complaint "need not now be considered for the complaint standing alone is insufficient in law"; that the facts in the *Moscow* case and the instant one, so far as material, were "parallel" and the Russian decrees the same; and that the *Moscow* case authoritatively settled the principles of law governing the instant one. The affidavit read in opposition to the motion stated that a petition for certiorari in the *Moscow* case was about to be filed in this Court; that the motion was premature and should be denied or decision thereon withheld pending the final decision of this Court. On June 29, 1939, the Supreme Court of New York granted the motion and dismissed the complaint "on the merits", citing only the *Moscow* case in support of its action. On September 2, 1939, a petition for certiorari in the *Moscow* case was filed in this Court. The judgment in that case was affirmed here by an equally divided Court. 309 U. S. 624. Subsequently

the Appellate Division of the Supreme Court of New York affirmed, without opinion, the order of dismissal in the instant case. The Court of Appeals affirmed with a *per curiam* opinion (284 N. Y. 555) which after noting that the decision below was "in accord with the decision" in the *Moscow* case stated:

"Three of the judges of this court concurred in a forceful opinion dissenting from the court's decision in that case, but the decision left open no question which has been argued upon this appeal. We are agreed that without again considering such questions this court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here."

We granted the petition for certiorari because of the nature and public importance of the questions raised.

First. Respondent insists that the complaint in this action was identical in substance and sought the same relief as the petition of the United States in the *Moscow* case, and that his answer set up the same defenses as were successfully sustained against the United States by the defendants in that case. He also maintains that both parties agreed on the motion for summary judgment that the decision in the *Moscow* case governed this cause, leaving no issues to be tried. We agree with those contentions. It is in accord not only with the motion papers but also with the ruling of the New York Court of Appeals that the *Moscow* case "left open no question which has been argued upon this appeal." In view of that ruling we are not free to inquire, as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the *Moscow* case. That is distinctly a question of state law on which New York has the last word.

But it does not follow, as respondent urges, that the writ should be dismissed as improvidently granted. The *Moscow* case is not *res judicata* since respondent was not a party to that suit. *Stone v. Farmers' Bank of Kentucky*, 174 U. S. 409; *Rudd v. Cornell*, 171 N. Y. 114, 127-128; *St. John v. Fowler*, 229 N. Y. 270, 274. Nor was our affirmance of the judgment in that case by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy (*Durant v. Essex Co.*, 7 Wall. 107), the lack of an agreement by a majority of the Court on the principles of law involved prevents it from

being an authoritative determination for other cases. *Hertz v. Woodman*, 218 U. S. 205, 213-214.

The upshot of the matter is that we now reach the issues in the *Moscow* case insofar as they are embraced in the pleadings in this case. And there is no reason why we cannot take judicial notice of the record in this Court of the *Moscow* case. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 217; *Dimmick v. Tompkins*, 194 U. S. 540, 548; *Freshman v. Atkins*, 269 U. S. 121, 124.

Second: The New York Court of Appeals held in the *Moscow* case that the Russian decrees² in question had no extraterritorial effect. If that is true, it is decisive of the present controversy. For the United States acquired under the Litvinov Assignment only such rights as Russia had. *Guaranty Trust Co. v. United States*, 304 U. S. 126, 143. If the Russian decrees left the New York assets of the Russian insurance companies unaffected, then Russia had nothing here to assign. But that question of foreign law is not to be determined exclusively by the state court. The claim of the United States based on the Litvinov Assignment raises a federal question. *United States v. Belmont*, 301 U. S. 324. This Court will review or independently determine all questions on which a federal right is necessarily dependent. *United States v. Ansonia Brass & Copper Co.*, 218 U. S. 452, 462-463, 471; *Ancient Egyptian Order v. Michaux*, 279 U. S. 737, 744-745; *Broad River Power Co. v. South Carolina*, 281 U. S. 537, 540; *Pierre v. Louisiana*, 306 U. S. 354, 358. Here title obtained under the Litvinov Assignment depends on a correct interpretation of Russian law. As in cases arising

² The three decrees on which the United States placed primary emphasis (apart from the one set forth in note 3, *infra*) were described in the findings of the referee in the *Moscow* case as follows:

"88. The decree of November 18, 1919 on the annulment of life insurance contracts abolished insurance of life in all its forms in the Republic and annulled all contracts with insurance companies and savings banks with respect to the insurance of life, capital and income.

"89. The decree of the Soviet of People's Commissars dated March 4, 1919, on the liquidation of obligations of State enterprises, provided that stock certificates and shares of joint stock companies, whose enterprises have been either nationalized or sequestered, are annulled and also provided that such enterprises are free from the payment of all debts to private persons and enterprises which have arisen prior to the nationalization of these enterprises, including payments on bond loans with the exception only of wages due to workers and employees.

"90. The decree of the Soviet of People's Commissars dated June 28, 1918 provides in Article I that the commercial and industrial enterprises enumerated therein, which are located within the boundaries of the Soviet Republic, together with all their capital and property, regardless of what the latter may consist, are declared the property of the Republic."

under the full faith and credit clause (*Huntington v. Attrill*, 146 U. S. 657, 684; *Adam v. Saenger*, 303 U. S. 59, 64), these questions of foreign law on which the asserted federal right is based are not peculiarly within the cognizance of the local courts. While deference will be given to the determination of the state court, its conclusion is not accepted as final.

We do not stop to review all the evidence in the voluminous record of the *Moscow* case bearing on the question of the extra-territorial effect of the Russian decrees of nationalization, except to note that the expert testimony tendered by the United States gave great credence to its position. Subsequent to the hearings in that case, however, the United States, through diplomatic channels, requested the Commissariat for Foreign Affairs of the Russian Government to obtain an official declaration by the Commissariat for Justice of the R.S.F.S.R. which would make clear, as a matter of Russian law, the intended effect of the Russian decree³ nationalizing insurance companies upon the funds of such companies outside of Russia. The official declaration, dated November 28, 1937, reads as follows:

"The People's Commissariat for Justice of the R.S.F.S.R. certifies that by virtue of the laws of the organs of the Soviet Government all nationalized funds and property of former private enterprises and companies, in particular, by virtue of the decree of November 28, 1918 (Collection of Laws of the R.S.F.S.R., 1918, No. 86, Article 904), the funds and property of former insurance companies, constitute the property of the State, irrespective of the nature of the property, and irrespective of whether it was situated within the territorial limits of the R.S.F.S.R. or abroad."

³ Relevant portions of the Insurance Decree dated November 28, 1918, translated in accordance with the findings of the referee in the *Moscow* case, are:

"603. On the organization of the insurance business in the Russian Republic.

"(1) Insurance in all its forms, such as: fire insurance, insurance on shipments, life insurance, accident insurance, hail insurance, livestock insurance, insurance against failure of crops, etc. is hereby proclaimed as a State monopoly.

"Note. Mutual insurance of movable goods and merchandise by the cooperative organizations is conducted on a special basis.

"(2) All private insurance companies and organizations (stock and share holding, also mutual) upon issuance of this decree are subject to liquidation; former rural* (People's Soviet) and municipal mutual insurance organizations operating within the boundaries of the Russian Republic are hereby proclaimed the property of the Russian Socialist Federated Soviet Republic.

"(3) For the immediate organization of the insurance business and for the liquidation of parts of insurance institutions, which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is es-

The referee in the *Moscow* case found, and the evidence supported his finding, that the Commissariat for Justice has power to interpret existing Russian law. That being true this official declaration is conclusive so far as the intended extraterritorial effect of the Russian decree is concerned. This official declaration was before the court below though it was not a part of the record. It was tendered pursuant to § 391 of the New York Civil Practice Act as amended by L. 1933, c. 690.⁴ In New York it would seem that foreign law must be found by the

established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Prevention, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual).

"Note. The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, remaining on hand after their liquidation, shall become the property of the Russian Socialist Federated Soviet Republic.

"(4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions, shall be accomplished not later than the first day of April 1919.

"(8) The present decree comes into force on the day of its publication.

"*zemskie."

The referee in the *Moscow* case found that upon publication of this decree all Russian insurance companies were prohibited from engaging in the insurance business in Russia; that they became subject to liquidation and were dissolved; that all of their assets in Russia became the property of the State; that on publication of the decree, the directors of the companies lost all power to act as directors or conservators of the property or to represent the companies in any way; and that the Russian Government became the statutory successor and domiciliary liquidator of companies whose property was nationalized.

*That section reads:

"A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or referee and included in the findings of the court or referee or charged to the jury, as the case may be. Such finding or charge is subject to review on appeal. In determining such law, neither the trial court nor any appellate court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this section, with the same force and effect as if the same had been admitted in evidence."

court (or in case of a jury trial, binding instructions, must be given), though procedural considerations require it to be presented as a question of fact. *Fitzpatrick v. International Railway Co.*, 252 N. Y. 127; *Petrogradsky M. K. Bank v. National City Bank*, 253 N. Y. 23. And under § 391 as amended it is clear that the New York appellate court has authority to consider appropriate decisions interpreting foreign law even though they are rendered subsequent to the trial. *Los Angeles Investment Securities Corp. v. Jolsyn*, 282 N. Y. 438. We can take such notice of the foreign law as the New York court could have taken.⁵ *Adam v. Saenger, supra*. We conclude that this official declaration of Russian law was not only properly before the court on appeal but also that it was embraced within those "written authorities" which § 391 authorizes the court to consider, even though not introduced in evidence on the trial. For while it was not "printed", it would seem to be "other written law" of unquestioned authenticity and authority within the meaning of § 391.

We hold that so far as its intended effect⁶ is concerned the Russian decree embraced the New York assets of the First Russian Insurance Co.

Third: The question of whether the decree should be given extra-territorial effect is of course a distinct matter. One primary issue raised in that connection is whether under our constitutional system New York law can be allowed to stand in the way.

The decision of the New York Court of Appeals in the *Moscow* case is unequivocal. It held that "under the law of this State such confiscatory decrees do not affect the property claimed here" (280 N. Y. 314); that the property of the New York branch acquired a "character of its own" which was "dependent" on the law of New York (p. 310); that no "rule of comity and no act of the United States government constrains this State to abandon any part of its control or to share it with a foreign State" (p. 310); that although the Russian decree effected the death of the parent company, the situs of the property of the New York branch was in New York; and that no principle of law forces New York to forsake the method of distribution authorized in the earlier appeal (255 N. Y. 415) and to hold that "the method which in 1931 con-

⁵ Hence the denial of the motion of the United States to certify the official declaration as part of the record of the *Moscow* case in this Court (281 N. Y. 518) would seem immaterial to our right to consult it.

⁶ See also note 7, *infra*.

formed to the exactions of justice and equity must be rejected because retroactively it has become unlawful" (p. 312).

It is one thing to hold as was done in *Guaranty Trust Co. v. United States*, *supra*, p. 142, that under the Litvinov Assignment the United States did not acquire "a right free of a preexisting infirmity" such as the running of the statute of limitations against the Russian Government, its assignor. Unlike the problem presented here and in the *Moscow* case, that holding in no way sanctions the asserted power of New York to deny enforcement of a claim under the Litvinov Assignment because of an overriding policy of the State which denies validity in New York of the Russian decrees on which the assigned claims rest. That power was denied New York in *United States v. Belmont*, *supra*. With one qualification to be noted, the *Belmont* case is determinative of the present controversy.

That case involved the right of the United States under the Litvinov Assignment to recover from a custodian or stakeholder in New York funds which had been nationalized and appropriated by the Russian decrees.

This Court, speaking through Mr. Justice Sutherland, held that the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; that the propriety of the exercise of that power is not open to judicial inquiry; and that recognition of a foreign sovereign conclusively binds the courts and "is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence." p. 328. It further held (p. 330) that recognition of the Soviet Government, the establishment of diplomatic relations with it, and the Litvinov Assignment were "all parts of one transaction, resulting in an international compact between the two governments." After stating that "in respect of what was done here, the Executive had authority to speak as the sole organ" of the national government, it added (p. 330): "The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2) require the advice and consent of the Senate." It held (p. 331) that the "external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning." And it added that "all international compacts and agreements" are to be treated

with similar dignity for the reason that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." p. 331. This Court did not stop to inquire whether in fact there was any policy of New York which enforcement of the Litvinov Assignment would infringe since "no state policy can prevail against the international compact here involved." p. 327.

The New York Court of Appeals in the *Moscow* case (280 N. Y. 309) distinguished the *Belmont* case on the ground that it was decided on the sufficiency of the pleadings, the demurrer to the complaint admitting that under the Russian decree the property was confiscated by the Russian Government and then transferred to the United States under the Litvinov Assignment. But, as we have seen, the Russian decree in question was intended to have an extra-territorial effect and to embrace funds of the kind which are here involved. Nor can there be any serious doubt that claims of the kind here in question were included in the Litvinov Assignment.⁷ It is broad and inclusive. It should be interpreted consonantly with the purpose of the compact to eliminate all possible sources of friction between these two great nations. See *Tucker v. Alexandroff*, 183 U. S. 424, 437; *Jordan v. Tashiro*, 278 U. S. 123, 127. Strict construction would run counter to that national policy. For, as we shall see, the existence of unpaid claims against Russia and its na-

⁷ A clarification of the Litvinov Assignment was made in an exchange of letters between the American Charge d'Affairs and the People's Commissar for Foreign Affairs on January 7, 1937. The letter of the former read:

"I have the honor to inform you that it is the understanding of the Government of the United States that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.

"The Government of the United States further understands that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the United States Court of Claims, and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by you to the President of the United States on November 16, 1933.

tionals which were held in this country and which the Litvinov assignment was intended to secure, had long been one impediment to resumption of friendly relations between these two great powers.

The holding in the *Belmont* case is therefore determinative of the present controversy unless the stake of the foreign creditors in this liquidation proceeding and the provision which New York has provided for their protection call for a different result.

Fourth: The *Belmont* case forecloses any relief to the Russian corporation. For this Court held in that case (301 U. S. at p. 332):
 " . . . our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens. . . . What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."

But it is urged that different considerations apply in case of the

"Will you be good enough to confirm the understanding which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment?"

The reply of the People's Commissar of Foreign Affairs was:

"In reply to your note of January 7, 1937, I have the honor to inform you that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.

"You are further informed that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the United States Court of Claims, and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by me to the President of the United States on November 16, 1933.

"I have the honor, therefore, to confirm the understanding, as expressed in your note of January 7, 1937, which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment."

foreign creditors⁸ to whom the New York Court of Appeals (255 N. Y. 415) ordered distribution of these funds. The argument is that their rights in these funds have vested by virtue of the New York decree; that to deprive them of the property would violate the Fifth Amendment which extends its protection to aliens as well as to citizens; and that the Litvinov Assignment cannot deprive New York of its power to administer the balance of the fund in accordance with its laws for the benefit of these creditors.

At the outset it should be noted that, so far as appears, all creditors whose claims arose out of dealings with the New York branch have been paid. Thus we are not faced with the question whether New York's policy of protecting the so-called local creditors by giving them priority in the assets deposited with the State (*Matter of People*, 242 N. Y. 148, 158-159) should be recognized within the rule of *Clark v. Williard*, 294 U. S. 211, or should yield to the Federal policy expressed in the international compact or agreement. *Santovincenzo v. Egan*, 284 U. S. 30, 40; *United States v. Belmont*, *supra*. We intimate no opinion on that question. The contest here is between the United States and creditors of the Russian corporation who, we assume, are not citizens of this country and whose claims did not arise out of transactions with the New York branch. The United States is seeking to protect not only claims which it holds but also claims of its nationals. H. Rep. No. 865, 76th Cong., 1st Sess. Such claims did not arise out of transactions with this Russian corporation; they are, however, claims against Russia or its nationals. The existence of such claims and their non-payment had for years been one of the barriers to recognition of the Soviet regime by the Executive Department. Graham, *Russian-American Relations, 1917-1933: An Interpretation*, 28 Am. Pol. Sc. Rev. 387; 1 Hackworth, *Digest of International Law* (1940) pp. 302-304. The purpose of the discussions leading to the policy of recognition was to resolve "all questions outstanding" between the two nations. Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1 (1933), p. 1. Settlement of all American claims against Russia was one method of removing some of the prior objections to recog-

⁸ In view of the disposition which we make of this case, we express no view on whether these creditors would be barred from asserting their claims here by virtue of the ruling in *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 538, that "anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

nition based on the Soviet policy of nationalization. The Litvinov Assignment was not only part and parcel of the new policy of recognition (*id.*, p. 13); it was also the method adopted by the Executive Department for alleviating in this country the rigors of nationalization. Congress tacitly recognized that policy. Acting in anticipation of the realization of funds under the Litvinov Assignment (H. Rep. No. 865, 76th Cong., 1st Sess.) it authorized the appointment of a Commissioner to determine the claims of American nationals against the Soviet Government. Joint Resolution of August 4, 1939, 53 Stat. 1199.

If the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment. To be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment. *Russian Volunteer Fleet v. United States*, 282 U. S. 481. A State is not precluded, however, by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of foreign countries and whose claims arose abroad. *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570. By the same token, the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors. And it matters not that the procedure adopted by the Federal Government is globular and involves a regrouping of assets. There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts. There is no reason why it may not through such devices as the Litvinov Assignment make itself and its nationals whole from assets here before it permits such assets to go abroad in satisfaction of claims of aliens made elsewhere and not incurred in connection with business conducted in this country. The fact that New York has marshaled the claims of the foreign creditors here involved and authorized their payment does not give them immunity from that general rule.

If the priority had been accorded American claims by treaty with Russia, there would be no doubt as to its validity. Cf. *Santovincenzo v. Egan*, *supra*. The same result obtains here. The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationali-

zation decrees. "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co. v. United States*, *supra*, p. 137. That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts. See *Guaranty Trust Co. v. United States*, *supra*, p. 138; *Kennett v. Chambers*, 14 How. 38, 50-51. As we have noted, this Court in the *Belmont* case recognized that the Litvinov Assignment was an international compact which did not require the participation of the Senate. It stated (301 U. S. pp. 330-331): "There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations." And see *Monaco v. Mississippi*, 292 U. S. 313, 331; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 318. Recognition is not always absolute; it is sometimes conditional. 1 Moore, *International Law Digest* (1906), pp. 73-74, 1 Hackworth, *Digest of International Law* (1940), pp. 192-195. Power to remove such obstacles to full recognition as settlement of claims of our nationals (Levitan, *Executive Agreements*, 35 Ill. L. Rev. 365, 382-385) certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Corp.*, *supra*, p. 320. Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs (see Moore, *Treaties and Executive Agreements*, 20 Pol. Sc. Q. 385, 403-417) is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.

"All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature;" The Federalist, No. 64. A treaty is a "Law of the Land" under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity. *United States v. Belmont*, *supra*, p. 331. See Corwin, *The President, Office & Powers* (1940), pp. 228-240.

It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy. *Guaranty Trust Co. v. United States*, *supra*, p. 143 and cases cited. For example in *Todok v. Union State Bank*, 281 U. S. 449, this Court took pains in its construction of a treaty, relating to the power of an alien to dispose of property in this country, not to invalidate the provisions of state law governing such dispositions. Frequently the obligation of a treaty will be dependent on state law. *Prevost v. Greneaux*, 19 How. 1. But state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. See *Nielsen v. Johnson*, 279 U. S. 47. Then the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum (*Griffin v. McCoach*, 313 U. S. 498, 506) must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. *Santovincenzo v. Egan*, *supra*; *United States v. Belmont*, *supra*.

Enforcement of New York's policy as formulated by the *Moscow* case would collide with and subtract from the Federal policy, whether it was premised on the absence of extraterritorial effect of the Russian decrees, the conception of the New York branch as a distinct juristic personality, or disapproval by New York of the Russian program of nationalization.⁹ For the *Moscow* case refuses to give effect or recognition in New York to acts of the Soviet Government which the United States by its policy of recognition

⁹ In this connection it should be noted that § 977(b) of the New York Civil Practice Act provides for the appointment of a receiver to liquidate local assets of a foreign corporation where, *inter alia*, it has been dissolved, liquidated, or nationalized. Subdivision 19 of that section provides in part:

" . . . such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or

agreed no longer to question. Enforcement of such state policies would indeed tend to restore some of the precise impediments to friendly relations which the President intended to remove on inauguration of the policy of recognition of the Soviet Government. In the first place, such action by New York, no matter what gloss be given it, amounts to official disapproval or non-recognition of the nationalization program of the Soviet Government. That disapproval or non-recognition is in the face of a disavowal by the United States of any official concern with that program. It is in the face of the underlying policy adopted by the United States when it recognized the Soviet Government. In the second place, to the extent that the action of the State in refusing enforcement of the Litvinov Assignment results in reduction or non-payment of claims of our nationals, it helps keep alive one source of friction which the policy of recognition intended to remove. Thus the action of New York tends to restore some of the precise irritants which had long affected the relations between these two great nations and which the policy of recognition was designed to eliminate.

We recently stated in *Hines v. Davidowitz*, 312 U. S. 52, 68, that the field which affects international relations is "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority"; and that any state power which may exist "is restricted to the narrowest of limits". There we were dealing with the question as to whether a state statute regulating aliens survived a similar federal statute. We held that it did not. Here we are dealing with an exclusive federal function. If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. Cf. *Chy Lung v. Freeman*, 92 U. S. 275, 279-280. Certainly the conditions for "enduring friendship" between the nations, which the policy of recog-

organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state."

dition in this instance was designed to effectuate,¹⁰ are not likely to flourish where contrary to national policy a lingering atmosphere of hostility is created by state action.

Such considerations underly the principle of *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302-303, that when a revolutionary government is recognized as a *de jure* government, "such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence." They also explain the rule expressed in *Underhill v. Hernandez*, 168 U. S. 250, 252, that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would "imperil the amicable relations between governments and vex the peace of nations." *Oetjen v. Central Leather Co.*, *supra*, p. 304. It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government had diligently endeavored to establish.

We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, ~~statutes~~, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry, when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts. For such reasons, Mr. Justice Sutherland stated in *United States v. Belmont*, *supra*, p. 331, "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."

We hold that the right to the funds or property in question became vested in the Soviet Government as the successor to the First

¹⁰ Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, *supra* note 1, p. 20.

Russian Insurance Co.; that this right has passed to the United States under the Litvinov Assignment; and that the United States is entitled to the property as against the corporation and the foreign creditors.

The judgment is reversed and the cause is remanded to the Supreme Court of New York for proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice REED and Mr. Justice JACKSON did not participate in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 42.—OCTOBER TERM, 1941.

The United States of America,
Petitioner,
vs.
Louis H. Pink, Superintendent of In-
surance of the State of New York,
et al.

On Writ of Certiorari to
the Supreme Court of
the State of New York.

[February 2, 1942.]

Mr. Justice FRANKFURTER.

The nature of the controversy makes it appropriate to add a few observations to my Brother DOUGLAS' opinion.

Legal ideas like other organisms cannot survive severance from their congenial environment. Concepts like "situs" and "jurisdiction" and "comity" summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of a private litigation, is to invoke a narrow and inadmissible frame of reference.

The expropriation decrees of the U.S.S.R. gave rise to extensive litigation among various classes of claimants to funds belonging to Russian companies doing business or keeping accounts abroad. England and New York were the most active centers of this litigation. The opinions in the many cases before their courts constitute a sizeable library. They all derive from a single theme—the effect of the Russian expropriation decrees upon particular claims, in some cases before and in some cases after recognition of the U.S.S.R., either *de jure* or *de facto*. One cannot read this body of judicial opinions, in the Divisional Court, the Court of Appeal and the House of Lords, in the New York Supreme Court, the Appellate Division, and the Court of Appeals, and not be left with the conviction that they are the product largely of casuistry, confusion, and indecision. See Jaffe, *Judicial Aspects of Foreign Relations*, *passim*. The difficulties were inherent in the problems

that confronted the courts. They were due to what Chief Judge Cardozo called "the hazards and embarrassments growing out of the confiscatory decrees of the Russian Soviet Republic", *Mutter of People (Russian Reinsurance Co.)*, 255 N. Y. 415, 420 and to the endeavor to adjust these "hazards and embarrassments" to "the largest considerations of public policy and justice", *James & Co. v. Second Russian Insurance Co.*, 239 N. Y. 248, 256, where private claims to funds covered by the expropriation decrees were before the courts, particularly at a time when non-recognition was our national policy.

The opinions show both the English and the New York courts struggling to deal with these business consequences of major international complications through the application of traditional judicial concepts. "Situs", "jurisdiction", "comity", "domestication" and "dissolution" of corporations, and other legal ideas that often enough in litigation of a purely domestic nature prove their limitations as instruments for solution or even as means for analysis, were pressed into service for adjudicating claims whose international implications could not be sterilized. This accounts for the divergence of views among the judges and for such contradictory and confusing rulings as the series of New York cases, from *Wulfsohn v. Soviet Republic*, 234 N. Y. 372, to the ruling now under review, *Moscow Fire Ins. Co. v. Bank of New York and Trust Co.*, 280 N. Y. 286, accounts for *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A. C. 112, compared with *Lazard Brothers & Co. v. Midland Bank*, [1933] A. C. 289, and for the fantastic decision in *Lehigh Valley R. Co. v. State of Russia*, 21 F. 8d 396, in which the Kerensky régime was treated as the existing Russian government a decade after its extinction.

Courts could hardly escape perplexities when citizens asserted claims to Russian funds within the control of the forum. But a totally different situation was presented when all claims of local creditors were satisfied and only the conflicting claims of Russia and of former Russian creditors were involved. In the particular circumstances of Russian insurance companies doing business in New York, the State Superintendent of Insurance took possession of the assets of the Russian branches in New York to conserve them for the benefit of those entitled to them. Liquidation followed, domestic creditors and policy holders were paid, and the Superin-

in accordance with diplomatic determination,

result of the

tendent found a large surplus on his hands. As statutory liquidator, the Superintendent of Insurance took the ground that "in view of the hazards and uncertainties of the Russian situation, the surplus should not be paid to any one, but should be left in his hands indefinitely, until a government recognized by the United States shall function in the territory of what was once the Russian Empire." 255 N. Y. 415, 421. So the Appellate Division decreed. 229 App. Div. 637. But the Court of Appeals reversed and the scramble among the foreign claimants was allowed to proceed. 255 N. Y. 415. The Court of Appeals held that the retention of the surplus funds in the custody of the Superintendent of Insurance until the international relations between the United States and Russia had been formalized "did not solve the problem. It adjourned it *sine die*." But adjournment, it may be suggested, is sometimes a constructive interim solution to avoid a temporizing and premature measure giving rise to new difficulties. Such I believe to have been the mischief that was bound to follow the rejection of the Superintendent's policy of conservation of the surplus Russian funds until recognition. Their disposition was inescapably entangled in recognition.

In the immediate case the United States sues, in effect, as the assignee of the Russian government for claims by that government against the Russian Insurance Company for monies in deposit in New York to which no American citizen makes claim. No manner of speech can change the central fact that here are monies which belonged to a Russian company and for which the Russian government has decreed payment to itself.

And so the question is whether New York can bar Russia from realizing on its decrees against these funds in New York after formal recognition by the United States of Russia and in light of the circumstances that led up to recognition and the exchange of notes that attended it. For New York to deny the effectiveness of these Russian decrees under such circumstances would be to oppose, at least in some respects, its notions as to the effect which should be accorded recognition as against that entertained by the national authority for conducting our foreign affairs. And the result is the same whether New York accomplishes it because its courts invoke judicial views regarding the enforcement of foreign expropriation decrees, or regarding the survival in New York of a Russian business which according to Russian law had ceased to exist, or regarding the power of New York courts over funds of Russian companies

owing from New York creditors. If this Court is not bound by the construction which the New York Court of Appeals places upon complicated transactions in New York in determining whether they come within the protection of the Constitution against impairing the obligations of contract, we certainly should not be bound by that court's construction of transactions so entangled in international significance as the status of New York branches of Russian companies and the disposition of their assets. Compare *Appleby v. City of New York*, 271 U. S. 364 and *Irving Trust Company v. Day*, 314 U. S. —. When the decision of a question of fact or of local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, we are not foreclosed by the state court's determination of the facts or of the local law. Otherwise national authority could be frustrated by local rulings. See *Creswill v. Knights of Pythias*, 225 U. S. 246; *Davis v. Wechsler*, 263 U. S. 22.

It is not consonant with the sturdy conduct of our foreign relations that the effect of Russian decrees upon Russian funds in this country should depend on such gossamer distinctions as those by which courts have determined that Russian branches survive the death of their Russian origin. When courts deal with such essentially political phenomena as the taking over of Russian businesses by the Russian government by resorting to the forms and phrases of conventional corporation law, they inevitably fall into a dialectic quagmire. With commendable candor, the House of Lords frankly confessed as much when it practically overruled *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, *supra*, saying through Lord Wright, "the whole matter has now to be reconsidered in the light of new evidence and of the historical evolution of ten years." *Lazard Brothers & Co. v. Midland Bank*, [1933] A. C. 289, 300.

For we are not dealing here with physical property—whether chattels or realty. We are dealing with intangible rights, with choses in action. The fact that these claims were reduced to money does not change the character of the claims and certainly is too tenuous a thread on which to determine issues affecting the relation between nations. Corporeal property may give rise to rules of law which, we have held, even in purely domestic controversies ought not to be transferred to the adjudication of impalpable claims such as are here in controversy. *Curry v. McCannless*, 307 U. S. 357, 363 *et seq.*

As between the states, due regard for their respective governmental acts is written into the Constitution by the Full Faith and Credit Clause (Art. IV, § 1). But the scope of its operation—when may the policy of one state deny the consequences of a transaction authorized by the laws of another—has given rise to a long history of judicial subtleties which hardly commend themselves for transfer to the solution of analogous problems between friendly nations. See *Huntington v. Attrill*, 146 U. S. 657; *Finney v. Guy*, 189 U. S. 335; *Milwaukee County v. White Co.*, 296 U. S. 268; *Pacific Ins. Co. v. Comm'n*, 306 U. S. 493, 502; *Pink v. A. A. A. Highway Express*, 314 U. S. —.

For more than fifteen years formal relations between the United States and Russia were broken because of serious differences between the two countries regarding the consequences to us of two major Russian policies. This complicated process of friction, abstention from friendly relations, efforts at accommodation, and negotiations for removing the causes of friction, are summarized by the delusively simple concept of "non-recognition". The history of Russo-American relations leaves no room for doubt that the two underlying sources of difficulty were Russian propaganda and expropriation. Had any state court during this period given comfort to the Russian views in this contest between its government and ours, it would, to that extent, have interfered with the conduct of our foreign relations by the Executive even if it had purported to do so under the guise of enforcing state law in a matter of local policy. On the contrary, during this period of non-recognition New York denied Russia access to her courts and did so on the single and conclusive ground: "We should do nothing to thwart the policy which the United States has adopted." *Russian Republic v. Cibrario*, 235 N. Y. 255, 263. Similarly, no invocation of a local rule governing "situs" or the survival of a domesticated corporation, however applicable in an ordinary case, is within the competence of a state court if it would thwart to any extent "the policy which the United States has adopted" when the President reestablished friendly relations in 1933.

And it would be thwarted if the judgment below were allowed to stand.

That the President's control of foreign relations includes the settlement of claims is indisputable. Thus, referring to the adhesion of the United States to the Dawes Plan, Secretary of State

Hughes reported "that this agreement was negotiated under the long-recognized authority of the President of the United States to arrange for the payment of claims in favor of the United States and its nationals. The exercise of this authority has many illustrations, one of which is the Agreement of 1901 for the so-called Boxer Indemnity." (Secretary Hughes to President Coolidge, February 3, 1925, MS., Department of State, quoted in 5 Hackworth, Digest of Int. Law, c. 16, § 514.) The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations, as was the case with Russia.

That the power to establish such normal relations with a foreign country belongs to the President is equally indisputable. Recognition of a foreign country is not a theoretical problem or an exercise in abstract symbolism. It is the assertion of national power directed towards safeguarding and promoting our interests and those of civilization. Recognition of a revolutionary government normally involves the removal of areas of friction. As often as not, areas of friction are removed by the adjustment of claims pressed by this country on behalf of its nationals against a new régime.

M. Such a settlement was made by the President when this country resumed normal relations with Russia. The two chief barriers to renewed friendship with Russia—intrusive propaganda and the effects of expropriation decrees upon our nationals—were at the core of our negotiations in 1933, as they had been for a good many years. The exchanges between the President and ~~Ambassador~~ Litvinov must be read not in isolation but as the culmination of difficulties and dealings extending over fifteen years. And they must be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy. The draftsmen of such notes must save sensibilities and avoid the explicitness on which diplomatic negotiations so easily founder.

The controlling history of the Soviet régime and of this country's relations with it must be read between the lines of the Roosevelt-Litvinov Agreement. One needs to be no expert in Russian law to know that the expropriation decrees intended to sweep the assets of Russian companies taken over by that government into Russia's control no matter where those assets were credited.

Equally clear is it that the assignment by Russia meant to give the United States as part of the comprehensive settlement everything that Russia claimed under its laws against Russians. It does violence to the course of negotiations between the United States and Russia and to the scope of the final adjustment to assume that a settlement thus made on behalf of the United States—to settle both money claims and to soothe feelings—was to be qualified by the variant notions of the courts of the forty-eight states regarding "situs" or "jurisdiction" over intangibles or the survival of extinct Russian corporations. In our dealings with the outside world the United States speaks with one voice and acts as one; unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.

SUPREME COURT OF THE UNITED STATES.

No. 42.—OCTOBER TERM, 1941.

The United States of America,
Petitioner;
vs.
Louis H. Pink, Superintendent of Insurance of the State of New York,
et al.

On Writ of Certiorari to
the Supreme Court of
the State of New York.

[February 2, 1942.]

Mr. Chief Justice STONE, dissenting.

I think the judgment should be affirmed.

As my brethren are content to rest their decision on the authority of the dictum in *United States v. Belmont*, 301 U. S. 324, without the aid of any pertinent decision of this Court, I think a word should be said of the authority and reasoning of the *Belmont* case and of the principles which I think are controlling here.

In the *Belmont* case the United States brought suit in the federal court to recover a debt alleged to be due upon a deposit account of a Russian national with a New York banker. The complaint set up the confiscation of the account by decrees of the Soviet Government and the transfer of the debt to the United States by the Litvinov assignment, concurrently with our diplomatic recognition of that Government. It was not alleged, nor did it appear, that the New York courts had, subsequent to recognition, refused to give effect to the Soviet decrees as operating to transfer the title of Russian nationals to property located in New York. No such national or any adverse claimant was a party to the suit. In sustaining the complaint against demurrer this Court said (p. 332): "In so holding, we deal only with the case as now presented and with the parties now before us. We do not consider the status of adverse claims, if there be any, of others not parties to this action. And nothing we have said is to be construed as foreclosing the assertion of any such claim to the fund involved, by intervention or other appropriate proceeding. We decide only

that the complaint alleges facts sufficient to constitute a cause of action against the respondents."

The questions thus explicitly reserved are presented by the case now before us. The courts of New York, in the exercise of the constitutional authority ordinarily possessed by state courts to declare the rules of law applicable to property located within their territorial limits, have refused to recognize the Soviet decrees as depriving creditors and other claimants representing the interests of the insurance company of their rights under New York law. Numerous individual creditors and other claimants, and the New York Superintendent of Insurance, who represents all claimants, are parties to the present suit and assert their claims to the exclusion of the United States.

It is true that this Court, in the *Belmont* case, indulged in some remarks as to the effect on New York law of our diplomatic recognition of the Soviet Government and of the assignment of all its claims against American nationals to the United States. Upon the basis of these observations it thought that the New York courts were bound to recognize and apply the Soviet decrees to property which was located in New York when the decrees were promulgated. But all this was predicated upon the mistaken assumption that by disregarding the decrees the New York courts would be giving an extraterritorial effect to New York law. These observations were irrelevant to the decision there announced and, for reasons shortly to be given, I think plainly inapplicable here. They were but *obiter dicta* which, so far as they have not been discredited by our decision in *Guaranty Trust Co. v. United States*, 304 U. S. 126, and so far as they now merit it "may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399; Mr. Justice Sutherland in *Williams v. United States*, 289 U. S. 553, 568.

We have no concern here with the wisdom of the rules of law which the New York courts have adopted in this case or their consonance with the most enlightened principles of jurisprudence. State questions do not become federal questions because they are difficult or because we may think that the state courts have given wrong answers to them. The only questions before us are whether New York has constitutional authority to adopt its own rules of law defining rights in property located in the state, and if so whether

that authority has been curtailed by the exercise of a superior federal power by recognition of the Soviet Government and acceptance of its assignment to the United States of claims against American nationals, including the New York property.

I shall state my grounds for thinking that the pronouncements in the *Belmont* case, on which the Court relies for the answer to these questions, are without the support of reason or accepted principles of law. No one doubts that the Soviet decrees are the acts of the government of the Russian state which is sovereign in its own territory, and that in consequence of our recognition of that government they will be so treated by our State Department. As such, when they affect property which was located in Russia at the time of their promulgation, they are subject to inquiry, if at all only through our State Department and not in our courts. *Underhill v. Hernandez*, 168 U. S. 250; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Ricaud v. American Metal Co.*, 246 U. S. 304, 308-10; *Saltnoff & Co. v. Standard Oil Co.*, 262 N. Y. 220. But the property to which the New York judgment relates has at all relevant times been in New York in the custody of the Superintendent of Insurance as security for the policies of the insurance company, and is now in the Superintendent's custody as Liquidator acting under the direction of the New York courts. *United States v. Bank of New York Co.*, 296 U. S. 463, 478-79. In administering and distributing the property thus within their control, the New York courts are free to apply their own rules of law including their own doctrines of conflict of laws, see *Erie Railroad v. Tompkins*, 304 U. S. 64, 78; *Griffin v. McCoach*, 313 U. S. 498; *Kryger v. Wilson*, 242 U. S. 171, 176, except insofar as they are subject to the requirements of the full faith and credit clause—a clause applicable only to the judgments and public acts of states of the Union and not those of foreign states. *Aetna Life Insurance Co. v. Tremblay*, 223 U. S. 185; cf. *Bank of Augusta v. Earle*, 13 Pet. 519, 589-90; *Bond v. Hume*, 243 U. S. 15, 21-22.

This Court has repeatedly decided that the extent to which a state court will follow the rules of law of a recognized foreign country in preference to its own is wholly a matter of comity, and that in the absence of relevant treaty obligations the application in the courts of a state of its own rules of law rather than those of a foreign country raises no federal question. *Rose v. Himely*, 4

Cranch 241; *Harrison v. Sterry*, 5 Cranch 289; *United States v. Crosby*, 7 Cranch 115; *Oakey v. Bennett*, 11 How. 33, 43-46; *Hilton v. Guyot*, 159 U. S. 113, 165-66; *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570; cf. *Baglin v. Cusenier*, 221 U. S. 580, 594-97; *United States v. Guaranty Trust Co.*, 293 U. S. 340, 345-47. This is equally the case when a state of the Union refuses to apply the law of a sister state, if there is no question of full faith and credit, *Kryger v. Wilson*, *supra*; *Finney v. Guy*, 189 U. S. 335, 340, 346; *Alropa Corp. v. Kirchwehm*, 313 U. S. 549; see *Milwaukee County v. White Co.*, 296 U. S. 268, 272-73, or due process, *Home Ins. Co. v. Dick*, 281 U. S. 397. So clearly was this thought to be an appropriate exercise of the power of a forum over property within its territorial jurisdiction that this Court, in *Ingenohl v. Olsen & Co.*, 273 U. S. 541, 544-45, accepted as beyond all doubt the right of the British courts in Hong Kong to refuse recognition to the American alien property custodian's transfer of exclusive rights to the use of a trademark in Hong Kong, and the Court gave effect here to the Hong Kong judgment.

In the application of this doctrine this Court has often held that a state following its own law and policy may refuse to give effect to a transfer made elsewhere of property which is within its own territorial limits. *Green v. Van Buskirk*, 5 Wall. 307, 311-12; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624; *Clark v. Williard*, 292 U. S. 112, 122; *Clark v. Williard*, 294 U. S. 211. So far is a state free in this respect that the full faith and credit clause does not preclude the attachment by local creditors of the property within the state of a foreign corporation, all of whose property has been previously transferred in the state of its incorporation to a statutory successor for the benefit of creditors. *Clark v. Williard*, *supra*; *Fischer v. American United Life Ins. Co.*, No. 91, decided this term. Due process under the Fifth Amendment, the benefits of which extend to alien friends as well as to citizens, *Russian Volunteer Fleet v. United States*, 282 U. S. 481, does not call for any different conclusion. *Disconto Gesellschaft v. Umbreit*, *supra*, 579-80.

At least since 1797, *Barclay v. Russell*, 3 Vesey, Jr., 424, 428, 433, the English courts have consistently held that foreign confiscatory decrees do not operate to transfer title to property located in England even if the decrees were so intended, whether the for-

eign government has or has not been recognized by the British Government. *Lecouturier v. Rey*, [1910] A. C. 262, 265. Cf. also *Folliott v. Ogden*, 1 H. Black. 123, 135-36; affirmed 3 T. R. 726, affirmed, 4 Brown's Cases in Parl., 111; and *Wolff v. Oxholm*, 6 M. & S. 92, both of which may have carried the doctrine of non-recognition of foreign confiscatory decrees even further. See Holdsworth, *The History of Acts of State in English Law*, 41 Columbia L. Rev. 1313, 1325-26. The English courts have applied this rule in litigation arising out of the Russian decrees, holding that they are not effectual to transfer title to property situated in Great Britain. *Sedgwick Collins & Co. v. Russia Insurance Co.*, [1926] 1 K. B. 1, 15, affirmed, [1927] A. C. 95; *The Jupiter* (No. 3), [1927] P. 122, 144-46, affirmed, [1927] P. 250, 253-55; *In re Russian Bank for Foreign Trade*, [1933] 1 Ch. 745, 767-68. The same doctrine has prevailed in the case of the Spanish confiscatory decrees, *Banco de Vizcaya v. Don Alfonso*, [1935] 1 K. B. 140, 144-45, as well as with respect to seizures by the American alien property custodian. *Sutherland v. Administrator of German Property*, [1934] 1 K. B. 423; and see the decision of the British court for Hong Kong discussed in *Ingenohl v. Olsen & Co.*, *supra*, and the Privy Council's decision in *Ingenohl v. Wing On & Co.*, 44 Patents Journal 343, 359-60. In no case in which there was occasion to decide the question has recognition been thought to have subordinated the law of the forum, with respect to property situated within its territorial jurisdiction, to that of the recognized state. Never has the forum's refusal to follow foreign transfers of title to such property been considered inconsistent with the most friendly relations with the recognized foreign government, or even with an active military alliance at the time of the transfer.

It is plain that under New York law the claimants in this case, both creditors and those asserting rights of the insurance company, have enforceable rights with respect to the property located there which have been recognized though not created by the judgments of its courts. The conclusion is inescapable that had there been no assignment and this suit had been maintained by the Soviet Government subsequent to recognition, or by a private individual claiming under an assignment from it, the decision of the New York court would have presented no question reviewable here.

The only question remaining is whether the circumstances in the present case that the Russian decrees preceded recognition and that the assignment was to the United States, which here appears in the role of plaintiff, call for any different result. If they do, then recognition and the assignment have operated to give to the United States rights which its assignor did not have. They have compelled the state to surrender its own rules of law applicable to property within its limits, and to substitute rules of Russian law for them. A potency would thus be attributed to the recognition and assignment which is lacking to the full faith and credit clause of the Constitution. See *Clark v. Williard, supra*; *Fischer v. American United Life Ins. Co., supra*.

In deciding any federal question involved, it can make no difference to us whether New York has chosen to express its public policy by statute or merely by the common law determinations of its courts. *Erie Railroad v. Tompkins, supra*; *Skiriotes v. Florida*, 313 U. S. 69, 79; *Hebert v. Louisiana*, 272 U. S. 312, 316. The state court's repeated declaration of a policy of treating the New York branch of the insurance company as a "complete and separate organization" would permit satisfaction of whatever claims of foreign creditors, as well as those of sister states, that New York deems provable against the local fund. But if my brethren are correct in concluding that all foreign creditors must be deprived of access to the fund, it would seem to follow—since the Soviet decrees have exempted no class of creditors—that the rights of creditors in New York or in sister states, or any other rights in the property recognized by New York law, must equally be ousted by virtue of the extraterritorial effect given to the decrees by the present decision. For statutory priorities of New York policyholders or New York lienholders, and the common law priorities and system of distribution which the judgment below endeavored to effectuate and preserve intact, must alike yield to the superior force said to have been imparted to the Soviet decrees by the recognition and assignment. Nothing in the Litvinov assignment or in the negotiations for recognition suggests an intention to impose upon the states discriminations between New York and other creditors which would sustain the former's liens while obliterating those of the latter. If the Litvinov assignment overrides state policies which protect foreign creditors, it can hardly be thought to do less to domestic creditors, whether of New York or a sister state.

I assume for present purposes that these sweeping alterations of the rights of states and of persons could be achieved by treaty or even executive agreement, although we are referred to no authority which would sustain such an exercise of power as is said to have been exerted here by mere assignment unratified by the Senate. It is true that in according recognition and in establishing friendly relations with a foreign country this Government speaks for all the forty-eight states. But it was never true that recognition alters the substantive law of any state or prescribes uniform state law for the nationals of the recognized country. On the contrary it does not even secure for them equality of treatment in the several states or equal treatment with citizens in any state save as the Constitution demands it. *Patson v. Pennsylvania*, 232 U. S. 138; *Ferrace v. Thompson*, 263 U. S. 197; *Clarke v. Deckebach*, 274 U. S. 392 and cases cited. Those are ends which can be achieved only by the assumption of some form of obligation expressed or fairly to be inferred from its words.

Recognition, like treaty making, is a political act and both may be upon terms and conditions. But that fact no more forecloses this Court, where it is called upon to adjudicate private rights, from inquiry as to what those terms and conditions are than it precludes, in like circumstances, a court's ascertaining the true scope and meaning of a treaty. Of course the national power may by appropriate constitutional means override the power of states and the rights of individuals. But without collision between them there is no such loss of power or impairment of rights, and it cannot be known whether state law and private rights collide with political acts expressed in treaties or executive agreements until their respective boundaries are defined.

It would seem therefore that in deciding this case some inquiry should have been made to ascertain what public policy or binding rule of conduct with respect to state power and individual rights has been proclaimed by the recognition of the Soviet Government and the assignment of its claims to the United States. The mere act of recognition and the bare transfer of the claims of the Soviet Government to the United States can of themselves hardly be taken to have any such effect, and they can be regarded as intended to do so only if that purpose is made evident by their terms, read in the light of diplomatic exchanges between the two countries and of the surrounding circumstances.

Even when courts deal with the language of diplomacy, some foundation must be laid for inferring an obligation where previously there was none, and some expression must be found in the conduct of foreign relations which fairly indicates an intention to assume it. Otherwise courts rather than the executive may shape and define foreign policy which the executive has not adopted.

We are not pointed to anything on the face of the documents or in the diplomatic correspondence which even suggests that the United States was to be placed in a better position with respect to the claim which it now asserts, than was the Soviet Government and nationals. Nor is there any intimation in them that recognition was to give to prior public acts of the Soviet Government any greater extraterritorial effect than attaches to such acts occurring after recognition—acts which by the common understanding of English and American courts are ordinarily deemed to be without extraterritorial force, and which in any event have never before been considered to restrict the power of the states to apply their own rules of law to foreign owned property within their territory. As we decided in *Guaranty Trust Co. v. United States*, *supra*, 143, and as the opinion of the Court now appears to concede, there is nothing in any of the relevant documents “to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the [New York] debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law”.

Recognition opens our courts to the recognized government and its nationals, see *Guaranty Trust Co. v. United States*, *supra*, 140. It accepts the acts of that government within its own territory as the acts of the sovereign, including its acts as a *de facto* government before recognition, see *Underhill v. Hernandez*, *supra*; *Oetjen v. Central Leather Co.*, *supra*; *Ricaud v. American Metal Co.*, *supra*. But until now recognition of a foreign government by this Government has never been thought to serve as a full faith and credit clause compelling obedience here to the laws and public acts of the recognized government with respect to property and transactions in this country. One could as well argue that by the Soviet Government's recognition of our own government, which accompanied the transactions now under consideration, it had

undertaken to apply in Russia the New York law applicable to Russian property in New York. Cf. *Ingenohl v. Olsen & Co.*, *supra*; *Pacific Ins. Co. v. Comm'n*, 306 U. S. 493, 501-02.

In *Guaranty Trust Co. v. United States*, *supra*, this Court unanimously rejected the contention that the recognition of the Soviet Government operated to curtail or impair rights derived from the application of state laws and policy within the state's own territory. It was argued by the Government that recognition operated retroactively for the period of the *de facto* government to set aside rights acquired in the United States in consequence of this government's prior recognition of the Russian Provisional Government. This argument we said, page 140, "ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a *de facto* government which by virtue of the recognition, has become a government *de jure*. But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own Government." Even though the two governments might have stipulated for alteration by this Government of its municipal law, and the consequent surrender of the rights of individuals, the substance of the Court's decision was that such an abdication of domestic law and policy is not a necessary or customary incident of recognition or fairly to be inferred from it. No more can recognition be said to imply a deprivation of the constitutional rights of states of the Union, and of individuals arising out of their laws and policy which are binding on the Federal Government except as the act of recognition is accompanied by some affirmative exercise of federal power which purports to set them aside.

Nor can I find in the surrounding circumstances or in the history of the diplomatic relations of the two countries any basis for saying that there was any policy of either to give a different or larger effect to recognition and the assignment than would ordinarily attach to them. It is significant that the account of the negotiations published by the State Department (*Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Eastern European Series No. 1*), and the report of subsequent

negotiations for adjustment of the claims of the two countries submitted to Congress by the Secretary of State (H. Rep. No. 865, 76th Cong., 1st Sess.) give no intimation of such a policy. Even the diplomatic correspondence between the two countries of January 7, 1937, to which the opinion of the Court refers, and which occurred long after the United States had entered the Moscow Fire Insurance Company litigation, merely repeated the language of the assignment without suggesting that its purpose had been to override applicable state law.

That the assignment after recognition had wide scope for application without reading into it any attempt to set aside our local laws and rights accruing under them is evident. It was not limited in its application to property alleged to be confiscated under the Soviet decrees. Included in the assignment by its terms were all "amounts admitted to be due (that may be found to be due it [the Soviet Government], as the successor of prior Governments of Russia, or otherwise, from American nationals". It included claims of the prior governments of Russia, not arising out of confiscatory decrees, and also claims like that of the Russian Volunteer Fleet, growing out of our own expropriation during the war of the property of Russian nationals. The assignment was far from an idle ceremony if treated as transferring only the rights which it purports to assign. Large sums of money have already been collected under it and other amounts are in process of collection without overturning the law of the states where the claims have been asserted.¹

At the time of the assignment it was not known what position the courts of this country would take with respect to property here, claimed to have been confiscated by the Soviet decrees. But it must have been known to the two governments that the English courts, notwithstanding British recognition of the Soviet government, had refused to apply the Soviet decrees as affecting property located in England. *Sedgwick Collins & Co. v. Russia Insurance Co.*, *supra*; *The Jupiter (No. 3)*, *supra*; *In re Russian Bank for Foreign Trade*, *supra*. It must also have been known that the similar views expressed by the New York courts before recognition with respect to property situated in New York raised at least a strong possibility

¹ By June 30, 1938, the sums collected by virtue of the Litvinov assignment amounted to \$1,706,443. Report of the Attorney General for 1938, p. 122. Other claims are apparently still in litigation. See the Report for 1939, p. 99; also H. Rep. No. 865, 76th Cong., 1st Sess., p. 2.

that mere recognition would not alter the result in that state. *Sokoloff v. National City Bank*, 239 N. Y. 158, 167-69; *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 257; *Joint Stock Co. v. National City Bank*, 240 N. Y. 368; *Petrogradsky M. K. Bank v. National City Bank*, 253 N. Y. 23, 29. The assignment plainly contemplated that this, like every other question affecting liability, was to be litigated in the courts of this country, since the assignment only purported to assign amounts admitted to be due or "that may be found to be due." It was only in the courts where the debtor or the property was located that the amounts assigned would normally be "found to be due". Cf. *United States v. Bank of New York*, *supra*.

By transferring claims of every kind, against American nationals, to the United States and leaving to it their collection, the parties necessarily remitted to the courts of this country the determination of the amounts due upon this Government's undertaking to report the amounts collected as "preparatory to a final settlement of the claims and counterclaims" asserted by the two governments. They thus ended the necessity of diplomatic discussion of the validity of the claims, and so removed a probable source of friction between the two countries. In all this I can find no hint that the rules of decision in American courts were not to be those afforded by the law customarily applied in those courts. But if it was the purpose of either government to override local law and policy of the states and to prescribe a different rule of decision from that hitherto recognized by any court, it would seem to have been both natural and needful to have expressed it in some form of undertaking indicating such an intention. The only obligation to be found in the assignment and its acknowledgment by the President is that of the United States, already mentioned, to report the amounts collected. This can hardly be said to be an undertaking to strike down valid defenses to the assigned claims. Treaties, to say nothing of executive agreements and assignments which are mere transfers of rights, have hitherto been construed not to override state law or policy unless it is reasonably evident from their language that such was the intention. *Guaranty Trust Co. v. United States*, *supra*, 143; *Tafel v. Union State Bank*, 281 U. S. 449, 454; *Rocca v. Thompson*, 223 U. S. 317, 329-34; *Disconto Gesellschaft v. Umbreit*, *supra*, 582; *Pearl Assur. Co. v. Harrington*, 38 F. Supp. 411, 413-14, affirmed, 313 U. S. 549; *Pat-*

sons v. Pennsylvania, 232 U. S. 138, 145-46; cf. *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 568, 576-77. The practical consequences of the present decision would seem to be, in every case of recognition of a foreign government, to foist upon the executive the responsibility for subordinating domestic to foreign law in conflicts cases, whether intended or not, unless such a purpose is affirmatively disclaimed.

Under our dual system of government there are many circumstances in which the legislative and executive branches of the national government may, by affirmative action expressing its policy, enlarge the exercise of federal authority and thus diminish the power which otherwise might be exercised by the states. It is indispensable to the orderly administration of the system that such alteration of powers and the consequent impairment of state and private rights should not turn on conceptions of policy which, if ever entertained by the only branch of the government authorized to adopt it, has been left unexpressed. It is not for this Court to adopt policy, the making of which has been by the Constitution committed to other branches of the government. It is not its function to supply a policy where none has been declared or defined and none can be inferred.

Mr. Justice ROBERTS joins in this opinion.